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MOSES—THE FIRST LAW GIVER

THE
ESSENTIALS
OF
COMMERCIAL LAW

BY

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FOREWORD

The aim of "Essentials of Commercial Law" is to develop in the student's mind such a knowledge of commercial law as will enable him, in conducting his business or profession later, to proceed within his legal rights, conserving his own best interests without trespassing upon the rights of others.

To fulfill this aim the author has set for himself and adhered to as far as possible the following ideals:

1. The course is planned to teach the student the attitude of caution and deliberation so that he will undertake business ventures thoughtfully and with a knowledge of his legal rights.

2. The subject has been developed by the more accurate inductive method.

3. The legal principles governing all honorable commercial relations have been presented in an easy, practical language understandable by the average pupil of the high school or commercial college.

4. To crystallize the principles in the learner's mind, a carefully prepared recapitulation follows the exposition of the principles of each chapter.

5. In order that the student will associate the imparted knowledge with real life, there is provided an abstract of actual cases decided by the courts of the land.

6. The appended test questions have been made interesting. They are designed to draw the student out and to exercise and develop his power of analysis.

7. There is sufficient construction work provided to give the student a self-confidence and initiative in preparing commercial papers that will be of material advantage to him on entering a business career. Wherever possible forms are given, and many are to be written up by the student.

8. A dividing line has been drawn between the important and less important phases of commercial law, with the result

that the vitally important are fully treated, while the less important are disposed of with a brief exposition.

The author wishes to express his great appreciation of the assistance of his collaborators and also to the following for valuable information, criticism, and assistance: W. C. Anderson, Esq., author of Anderson's Law Dictionary; the West Publishing Company, for permission to make extracts from the West's Digests; O. D. Frederick, M. S., Tuley High School, Chicago; and Edward T. Taylor, Attorney at Law, Lane Technical High School, Chicago.

W. H. W.

Chicago, August 1, 1913.

PLAN OF THE WORK

The following is a brief outline of the text, giving the teacher an idea of the author's plan of development, after fifteen years as a teacher of the subject in commercial and high schools and seven years as a teacher of common law in Chicago law schools.

1. TOPICAL OUTLINE.
2. DEVELOPMENT OF THE PRINCIPLES.
3. RECAPITULATION.
4. QUESTIONS.
5. DECISIONS BY THE COURTS.
6. HYPOTHETICAL QUESTIONS.
7. CONSTRUCTION WORK.
8. SEARCH QUESTIONS.
9. GLOSSARY.

1. The topical outlines given at the beginning of each chapter are to enable the instructor to follow the general development of the chapter without paying any attention to the text matter. This outline could be used as a blackboard outline if desired.

There is a certain continuity in each chapter that should be followed by the teacher from the beginning to the end, together with such illustrations as he may deem desirable. Then a study of a few selected cases should clinch the idea and enable the student to begin that differentiation of facts and conditions that is so important in all departments of law. No legal education is quite so liable to erroneous conclusions as that built on a knowledge of cases where the student has not mastered the legal principles that underlie and that should enable him to differentiate between the facts of several cases

that are applicable in whole or in part to the facts under consideration.

2. The development of the principles of law is in logical order, and a sequence in presentation is pursued in each chapter. Whenever it is thought necessary or desirable, illustrations are used.

3. The recapitulation at the end of each chapter should be valuable to the student for short reviews.

4. The sets of questions are given that the student may form an idea of the method used in determining the character of the text.

5. The lists of decisions contain very carefully selected cases stating the application of the law. A case is the result of a trial. In any given case certain facts are alleged to exist on one side and certain other facts or contra ones on the other side. The greater weight of evidence establishes the facts of the case; the law is applied to these facts, and the decision arrived at. When duly entered of record, it constitutes the judgment of the court.

The recapitulations and decisions by the courts should afford the student a splendid opportunity for a thorough review.

6. The hypothetical problems present sets of facts as they exist—to which the student may apply legal principles in arriving at a conclusion. They also afford ample field for discussion.

7. The construction work given should be made use of to the fullest extent. The study of commercial law produces greater benefit to the student by developing his ability to fill out properly the papers used in the business world than in training him to answer abstruse legal questions.

8. The search questions are to direct the student's attention to the laws of the particular state in which he lives. For example: The corporation is recognized by the general government and each of the forty-eight states as an association

of individuals for the purpose of conducting business. Yet no two of the several state governments have exactly the same laws for the organization and maintenance of such a business association. Therefore it becomes necessary to study the legal details in the particular state in which the student lives. But to study the statutes of his state alone in reference to corporations, would give him but a meager and hazy idea of a corporation. As a matter of fact, the state law is but the legal machinery to put the corporation engine in running order. The student must study the common law to get a knowledge of the general mechanism of corporations.

State laws are in reality rules and regulations for the conduct of the affairs of mankind rather than the laying down, development, or determination of a legal principle; and these rules and regulations are being constantly changed, yet the common law principles of several centuries' standing are practically unchanged.

The state laws or state statutes are not necessarily built on principles of the common law or conditions long established, but on what the people conceive to be the proper solution of economic or other conditions that exist to-day, and therefore require special attention. A knowledge of the statutes of a state does not constitute a legal education. It is a source of information in which social, economic, or political rights of to-day are readjusted to the legal principles of long established recognition. The next legislature may change the whole procedure.

The principles underlying the common law are woven into the entire fabric of human progress and may not be denied, but are susceptible to restriction and change in their course by statutory enactment and even by judicial interpretation.

9. The glossary containing the definition of legal terms is given for reference purposes. The student should have at hand a good law dictionary as well as a recognized unabridged dictionary.

Short Course. If the time allotted is short and the teacher desires to emphasize certain phases of commercial law rather than to hurry through a longer course, the following topics are suggested as offering a practical course: *contracts, agency, partnership, bailments, corporations, and negotiable paper*, emphasizing the first and the last.

BIBLIOGRAPHY

Reference books that would be of great value and assistance. Several are named on most of the subjects discussed in the text. One should be procured on each subject. The books named have been selected with special reference to their style and contents. The publishers' names are as follows and will be referred to by number:

- No. 1. West Publishing Co.....St. Paul, Minn.
- No. 2. T. H. Flood & Co.....Chicago, Ill.
- No. 3. Callaghan & Co.....Chicago, Ill.
- No. 4. Little, Brown & Co.....Boston, Mass.
- No. 5. F. H. Thomas Law Book Co.....St. Louis, Mo.

A short list of books that should be available:

The Statutes or Code of the student's State.

Anderson's Law Dictionary (No. 2).....Price, \$7.50

Owen's Law Quizzer, an extremely valuable book covering 27 legal subjects for class work, 2,925 questions and answers (No. 1).....Price, \$4.00

Bishop on Contracts (No. 2).....Price, \$6.00

Tiedman Bills and Notes (No. 5).....Price, \$3.50

Sedgwick on Damages (No. 4).....Price, \$3.00

This book contains abstracts of several hundred cases.

Additional books of high standing and well adapted to student work:

No. 4.

Harriman on Contracts.....Price, \$3.00

Huffcut on Agency.....Price, \$3.00

Burdick on Partnership.....Price, \$3.00

Burdick on Sales.....Price, \$3.00

Taylor on Corporations.....Price, \$6.00

Bigelow on Bills, Notes and Checks.....Price, \$3.00

Schouler on Bailments.....Price, \$3.00

Vance on Insurance.....Price, \$3.75

Goodwin on Real Estate.....Price, \$4.00

No. 1.

Clark on Contracts.....	Price, \$3.75
George on Partnership.....	Price, \$3.75
Tiffany on Agency.....	Price, \$3.75
Tiffany on Sales.....	Price, \$3.75
Hale on Torts.....	Price, \$3.75
Norton on Bills and Notes.....	Price, \$3.75
Hale on Bailments.....	Price, \$3.75

No. 5.

Lawson on Contracts.....	Price, \$5.00
Lawson on Bailments.....	Price, \$5.00

No. 2.

Tiedman on Real Estate.....	Price, \$6.00
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No. 3.

Anson on Contracts.....	Price, \$3.50
Mechem on Partnership.....	Price, \$2.50
Van Zile on Bailments.....	Price, \$6.00
Warvelle on Real Property.....	Price, \$4.00

[One text on any one subject is sufficient.]

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The history of the world is but
the biographies of great men.

—*Carlyle.*

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ESSENTIALS OF COMMERCIAL LAW

CHAPTER I

INTRODUCTION

1. DEFINITION
2. KINDS OF LAW
 1. Natural Law
 2. Moral Law
 3. International Law
 4. Municipal Law
 5. Common Law
 6. Statute Law
 7. Commercial Law
3. IMPORTANCE OF COMMERCIAL LAW
4. RECAPITULATION
5. QUESTIONS

1. **Definition.** A law is a rule of action. It is a rule of action or conduct, laid down by those having authority, for the guidance of all within its jurisdiction. "It should be kept in mind that the greatest good to the greatest number is the object of the law." The letter of the law and the forms of the law concern every man and woman at almost every important step in life.

The Legislative Department of the Government makes rules or laws for the people of the United States. Each State Legislature does the same for its particular State, so also the County Commissioners and the Board of Aldermen are given limited law-making powers. Among savages the chief makes the laws. In civilized communities the head of the family does likewise.

The scope over which the law has force is bounded by the territory over which the law-making body has control or jurisdiction. Thus the laws of New York do not affect the people of California, or *vice versa*, unless the people of one state visit the other.

The necessity for law is self-evident. It is our assurance that the strong shall not trample on the weak; that the rich and powerful shall not deprive the poor of their rights without just compensation. If all men were honest, and born with a disposition to "do unto others as they would that others should do unto them," there would be little need of laws and lawyers, but mankind is ever apt to be selfish and aggressive and to strive selfishly to obtain what is not right; consequently, laws are formed for the protection of him who otherwise would be at the mercy of those more powerful than himself. Law is protective. It consists of a code of principles based upon right and justice, the fundamentals of which are the Ten Commandments. It says to the thief, "You shall not steal and profit thereby"; to the murderer, "You shall not kill and escape unpunished"; to the robber, "You shall not have the property of another without giving value for value."

2. Kinds of Law. 1. *Natural Law.* The rules of human action as prescribed by the Creator and as revealed and discoverable by the light of reason, constitute natural law. Among others are three general precepts: That we should live honestly, should hurt nobody, and should render to everyone his due. The primitive laws of nature may be reduced to *six*, namely: (1) comparative sagacity, or reason, which enables a properly constituted human being to distinguish good from evil; (2) self-love, which includes self-preservation; (3) the rights of husband and wife; (4) the tenderness of parents toward their children; (5) the religious sentiment; and (6) sociability, the feeling upon which the existence of society depends.

2. *Moral Law.* The rules and laws of divinity, prescribed and laid down regarding moral conduct, the law of moral precepts of the Mosaic Code, as distinguished from the ceremonial and

civil features of that code, constitute the moral law. Example:—The Ten Commandments.

3. *International Law.* The law which regulates the conduct and mutual intercourse of independent states is called international law. •It is largely determined and established by treaties and by principles and doctrines of long and recognized standing.

4. *Municipal Law.* Municipal law comprises the laws of a particular state or country, the rules of civil conduct, laid down by the supreme authority, commanding what is right and prohibiting what is wrong. Examples:—Abolition of days of grace in some states; granting married women equal rights with men in holding and transferring property. Municipal laws change and modify other municipal laws or they change the common law.

5. *Common Law.* The common law is a collection of rules and customs, handed down from former generations, that have been finally adopted and incorporated into the general law of the country as best suited to the needs of its people. It originated in the early history of England, and has received additions from time to time from the decisions of great judges relating to the common affairs of life. It is sometimes called the unwritten law. Common law is constantly being formed by customs and usage.

6. *Statute Law.* The statute law is the written will of the people, or the acts of a legislature, expressed in the proper form. It constitutes the law of the government, state, county, city, or town passing same. Examples:—Acts passed by Congress, by any State Legislature, by any Board of Aldermen, by County Commissioners.

7. *Commercial Law, or the Law Merchant.* The body of commercial usages or rules recognized by civilized nations as relating to the rights of persons engaged in trade, is said to be “the system of law which the Courts of England and the United States apply to mercantile contracts. It is a branch of the Common Law, inferior in importance to no other, and in many respects quite distinct from any other. The principal objects embraced within it are the law of shipping (which includes the law of

marine insurance), the law of negotiable bills of exchange and promissory notes, and the law of sales."

3. Importance of Commercial Law. The importance of Commercial Law can hardly be overestimated from the standpoint of a business or a professional man who daily is brought in contact with the transaction of business. No man can be expected to know all the law, although the legal maxim, "Ignorance of the law excuses no one," applies to all. Mr. Justice Story says: "As every man is presumed to know the law and to act upon the rights which it confers, when he knows the facts it is a culpable negligence in him to do an act, or make a contract, and then set up his ignorance as a defense." A business man must know the law or suffer the consequences. He should know his legal rights that he may protect himself fully, and also that he may escape the consequence of doing what he has no right to do under the mistaken idea that he is transacting business in a proper and legal manner.

4. RECAPITULATION

A law is a rule of action.

Laws have been handed down to us as a part of the system known as the common law, or they are passed as statutes by Congress and the State Legislatures.

In general, the laws of a state have no operation beyond its boundaries.

The rules of human action revealed and discoverable by the light of reason constitute natural law.

The moral law comprises those rules laid down for the guidance of moral conduct.

International law is the law of nations. It regulates the mutual intercourse of independent states.

Municipal law is the law in force in a particular state or jurisdiction.

The common law is a collection of rules and customs handed down from former generations and adopted as well suited to the needs of the people.

Statute law is the written will or the acts of legislatures expressed in the form of positive rules as law.

Commercial law consists of the usages and rules adopted and long used in commercial transactions.

5. QUESTIONS

What is law? What is its object? What is the source of our laws? What is the territorial boundary of a law? Why is law necessary?

Name the different kinds of law. What is natural law? Moral law? International law? Common law? Statute law? Give example of each.

What is commercial law? What are some of the subjects to which it relates? Why is a knowledge of commercial law important? Explain the legal maxim "Ignorance of the law excuses no one." Why should not ignorance of a law excuse a wrongdoer?

CHAPTER II

PROPERTY

6. PROPERTY
7. DEVELOPMENT
 1. Personal Property
 2. Real Property
 3. Mixed Property
8. CHANGES
9. OWNERSHIP
 1. Kinds of Ownership
 2. Limitations Placed Upon Ownership
10. RECAPITULATION
11. QUESTIONS

6. **Property.** Property, in a general sense, is what one owns to the exclusion of others. The artist takes a canvas of little value, paints and oils, and by the strokes of genius produces a masterpiece. This picture that he has created is property. It is his exclusively. He has the right to do with it what he chooses so long as he does not interfere with the rights of others. It has value because it will satisfy the desire of others, it will be sought by them. The early settler pre-empted or takes up a claim of government lands. He acquires an exclusive right to this property. It is his to do with as he chooses. It is a thing of value—he may sell or exchange or use it for any of the purposes for which land is ordinarily used. Property, therefore, includes everything that may be owned; it is an exclusive right to a transferable thing of value. Property, in an abstract sense, means ownership, title, estate, right; in a concrete sense, it means the thing owned.

7. **Development.** The first laws enacted, or handed down, were rules for the suppression of violence and the settling of quarrels. In its progress and development the community soon recognized the right of the individual to certain property, things necessary to sustaining and protecting life, such as the rude implements of agriculture and those used in the chase and in warfare. Lastly, it recognized the right of the individual to the use and occupancy of a portion of the land. Two classes of property came to be recognized, personal property and real property.

1. *Personal Property.* Personal property includes all property that may readily accompany the person and is easily moved from place to place. Examples of personal property are stocks, bonds, notes, moneys, horses, cattle, furniture, implements, etc.

2. *Real Property.* Real property includes all property that is of a fixed nature, generally defined as immovable; as, land, including all that is firmly attached thereto, not only the surface with the growing timber and buildings thereon, but mineral deposits beneath. Land, in contemplation of law, extends from the center of the earth upward indefinitely to the sky.

3. *Mixed Property.* Mixed property includes such property as in its nature partakes of the characteristics of both personal and real; as, leasehold interests.

8. **Changes.** Through the agency of man property is frequently changed back and forth from one class to the other. Thus, growing timber is classed as real; if cut down and manufactured into lumber, it is classed as personal; but if the lumber is used in constructing fences or buildings, it again becomes real property. Many such examples exist.

9. **Ownership.** It frequently happens in the affairs of business that both the title and the possession of a chattel are not in the same person. If the title and possession are together, it illustrates a thing, or *chose*, in possession. If the title is in one person and the possession with another, the person having title is said to have a chose in action; that is, he may have an action or suit at law to recover his property or the value thereof. A chose

in possession consists in title and possession to personal property being in the same person. A chose in action consists in a thing of which one has the title but not the possession. In a large sense, a chose in action may be considered not only as a right to recover possession, but a right to damages, whether growing out of the commission of a *tort*, an omission of a duty, or a breach of contract. A sells a horse to B and takes B's note for the purchase price. The note is a chose in action. An action at law may be necessary to recover the value.

1. *Kinds of Ownership.* When the ownership rests in one person he is said to be the sole owner, but the ownership may be in several persons. If all have an equal share and the titles are the same, the estate is that of joint tenancy, and under the old common law the right of survivorship applies; that is, the interest of one at his death passes to the remaining joint owners, rather than to his heirs or representatives. If the tenants merely hold the same possession, but the interests are not equal, or arise from different sources of title, it is tenancy in common. Upon the death of a tenant in common his interest descends to his heirs or representatives.

2. *Limitations Placed Upon Ownership.* While a person may own property to the exclusion of all others, there are yet certain limitations that will now be considered.

First. The owner is not at liberty to use his property in such a way as to injure another.

Second. The state or government reserves the right to take a part of a person's property for the support of the state and for the improvement of public institutions. This is the right of taxation.

Third. The state has the right to control the use of property under certain limitations and in some cases to take the property even to the extent of destroying it. This is known as police power.

Fourth. A person's property is liable to be taken by direction of the court for the payment of his debts. His just debts must

be paid—he cannot give away his property and thereby defraud his creditors. However, one who makes a *bona fide* purchase will be protected in his title to the goods, or land, as the case may be.

Fifth. Sovereignty implies the power to order and direct for the best interests of the community. Therefore, the state has power to dispossess a person of the ownership of property and convert it to the use of the public. When property is so taken the state is bound to pay to the owner a fair compensation. This is exercising the “right of eminent domain.”

10. RECAPITULATION

Property consists of those things which one holds by just right to the exclusion of others. It includes also the right of transfer or conveyance.

Property is of two kinds, personal and real.

Personal property is such as attends the person and is easily moved from place to place. It is subdivided into choses in action and in possession.

A chose in action consists in a thing of which one has the right or title but not the possession.

A chose in possession consists in a thing of which both the title and possession are held by the same person.

Real property includes all such property as is fixed or immovable in its nature.

Property which partakes in its nature of the qualities of both real and personal is called mixed property.

Ownership is sole or several when held by only one person; when held by two or more persons it is joint.

At the common law, if the tenants held by the same interest, time, title, and possession, a joint tenancy arose; but if by the same possession merely, a tenancy in common.

There are several limitations placed on the ownership of property. It may not be so used as to injure another; it is subject to the right of taxation, police power, payment for debts, and eminent domain.

11. QUESTIONS

What is property? Give examples. How many elements are necessary? Name them.

Trace the development of property rights. Name the classes of property. Define personal property; real property; mixed property. Give several examples of each. Give illustrations of property changing from one class to the other.

Name the classes of personal property. What is the basis for this classification? Give several examples of each. Give several examples of choses in action and then illustrate the separation of these. Name the kinds of ownership. Define each. What is the right of survivorship?

Has one an absolute or a relative ownership in his property? Explain the limitations of one's ownership. Point out a difference between the police power of a state and its power of eminent domain.

CHAPTER III.

SOURCES OF LAW

12. FEDERAL AND STATE CONSTITUTIONS

13. RECAPITULATION

14. QUESTIONS

12. Constitutions. During the colonial times, the laws in force in this country were the laws of England, now forming the greater part of our common law. During the Revolutionary War the Articles of Confederation were in force, and to a certain extent suspended the English laws. After independence was secured, a general government was established and the United States Constitution was adopted, enumerating and defining the government's rights and powers and modifying the English common law in so far as it was not suited to our changed condition. The people of each colony organized as a state by framing and adopting a constitution. The United States and each state made new rules and laws and changed old ones, thereby modifying the common law, yet never entirely doing away with it. In fact, it may be said that the old common law spreads over the entire country like a net, and if, perchance, a wrongdoer should escape all federal or state law, he would be caught in the meshes of the common law, the foundation of our whole legal system.

The United States secures the enforcement of rights and the punishment of transgressors by the law and rules found in the Constitution, Congressional enactments, and in the common law. Each state secures the same power from the state constitution, from state legislative enactments, as well as from the common law, being also at the same time under the protecting influence of the United States Constitution and Federal statutes.

The fundamental legal principle is to allow citizens to do everything except what is forbidden; a despotic government allows its citizens to do only what is prescribed and denies all else.

When we wish to know the law on a particular point, we examine the authorities, law books, to see if the thing in question is prohibited, and if so, we are forbidden to do it; if no prohibition is found, the performing of it is perfectly legal and lawful. The reverse would be the rule under a despotism. Some of our laws trace their source back to the old Roman, or Civil law. The Civil Law is the foundation of the law of Louisiana.

The relationship of the laws from the several sources is such that if there is a conflict between any two, the one higher in the scale will prevail and the lower must cease to operate. This relationship was early determined by the Supreme Court of the United States in the celebrated case of *Marbury v. Madison*:

"The original and supreme will (the people) organizes and assigns to different departments their respective powers. The powers of the legislature are defined and limited. That these limits may not be forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? Certainly all those who have framed written constitutions contemplate them as the fundamental paramount law of the nation, and consequently the theme of every such government must be that an act of the legislature repugnant to the constitution is void. It is emphatically the province and duty of the judicial department to say what the law is. If a law be in opposition to the Constitution, the court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law. The court must determine which of the conflicting rules governs the case. This is the very essence of the judicial duty. The courts cannot close their eyes to the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that these limits may be passed at pleasure."

This decision establishes the fact that the Supreme Court of the United States has the power to annul a law passed by Congress; that is, if the law contravenes the principles of the Con-

stitution. The Supreme Court "is by far the most powerful court in the world. It is the only one that can nullify an act of the people of a nation, or the people's representatives. Ours is the only nation in which the Supreme Court assumes to be a co-ordinate branch of the government. It is the more remarkable that a popular government should be the one in which the most powerful, and the one completely irresponsible, department of the government has no direct connection with the people."

While the Federal Constitution ranks higher than the State Constitution in the scheme outlined, yet one must recognize the fact that in some instances the State Constitution is supreme.

The Federal Constitution is one of delegated powers from which follow implied and resultant powers. The State Constitution is one of retained powers. Both constitutions contain some restrictions, some powers that a democratic-republican government ought not to possess. The State Constitution in addition is restrained from exercising jurisdiction of the powers delegated to the general government. The State Constitution therefore lacks some of the elements of sovereignty.

When the framers of the Federal Constitution met to discuss the advisability of a new constitution for the thirteen colonies or states, they finally concluded to give the Federal government such powers as would pass the following tests: first, will the states surrender the power; second, does the Federal government need the power; and third, does it affect all the states equally. For illustrative purposes one may imagine that each power possessed by sovereignty is submitted to the tests. If it passes the tests, it becomes one of the powers that go to the general government; if it does not pass the tests, it is retained by each of the several states. Thus we have on the one hand a government of delegated power and on the other a government of retained powers.

13. RECAPITULATION

The primary sources of our law are to be found in the old common law of England.

The supreme organic law of the nation is the Constitution of the

United States. Under its powers, and within its limitations, the Congress of the United States enacts laws for the country at large.

The supreme organic law of each state in so far as it does not conflict with the United States Constitution is the State Constitution. Under authority of the State Constitution and within its retained powers the State Legislature passes laws for the state.

The several sources of laws and their order is as follows: 1. The United States Constitution. 2. Congressional enactments, laws, and treaties. 3. The State Constitutions. 4. Legislative enactments. 5. The common law and the civil law.

14. QUESTIONS

Name the sources of law. Which is the highest? How did we get the Constitution?

What is the source of the common law? Why did we not adopt all of the English laws? Where do we get the statute laws?

What is the difference between allowing everything except what is forbidden, and forbidding everything except what is allowed?

How did Louisiana happen to adopt the Civil law as a fundamental law?

What legal principle is laid down in *M. v. M.*?

How would our Constitution have been affected if the decision had been the reverse?



EMPEROR JUSTINIAN

JUSTINIAN (483-565)

Emperor of the East; celebrated law giver. The most valuable gift of Rome to the world was its system of jurisprudence, Rome's greatest product her lawyer's and jurists. When Justinian came to the throne in 527, ambitious "to restore the grandeur of the Empire," the statutes and decisions constituting the legal system of Rome, laws and rulings which had been developed during a period of over a thousand years, had become greatly confused. Accordingly, he appointed Tribonian, a celebrated lawyer, to revise and codify the laws. He compiled the *Code* of twelve books of statutes, and the *Digest* of fifty books of decisions of learned lawyers. Later the *Institutes* were written. This text is to-day used by students of the civil law. It is the basis of the modern laws of Europe.

Bryce says of the *Institutes*, "Being studied by all the educated men, the poets, the philosophers, the administrators of the Middle Ages, it worked itself into the thoughts of Christendom, losing the traces of its origin as it became the common property of the world."

CHAPTER IV.

FORMATION OF CONTRACTS

15. CONTRACTS

1. What the Subject Includes
2. Definition
3. Elements of a Contract

16. DIVISION OF CONTRACTS ACCORDING TO FORM

1. Specialty
2. Parol
 - (a) Written Parol Contracts
 - (b) Oral Parol Contracts
 - (c) Express Contracts
 - (d) Implied Contracts

17. FREQUENCY OF IMPLICATION

18. TIME OF PERFORMANCE

1. Executed Contracts
2. Executory Contracts

19. VALIDITY OF CONTRACTS

1. Valid
2. Void
3. Voidable
4. Unenforceable

20. RECAPITULATION

21. QUESTIONS

22. DECISIONS BY THE COURTS

15. Contracts. 1. *What the Subject Includes.* Contracts in a broad and comprehensive view include by far the greater part of all law that relates to the affairs of man, except the law of court procedure and the law of crimes. The merchant hires a clerk; this transaction is a contract. The farmer sells his cattle; this also constitutes a contract. If two men agree to carry on a cer-

tain business, the agreement is a contract and is called a partnership. The banker gives his note; it is a contract. You buy a newspaper on your way to the office; it is a contract. The state grants a railway company a right of way, called a franchise; it is a contract. In fact, the smallest enterprise as well as the greatest undertaking is subject to the law of contracts.

2. *Definition.* A contract, then, is an agreement made for a legal consideration between competent parties to do or not to do a particular thing.

3. *Elements of a Contract:*

(1) The parties.

(2) The subject matter. (Thing to be done or not to be done.)

(3) The consideration. (Generally money.)

(4) The agreement— $\left\{ \begin{array}{l} \text{Offer} \\ \text{Acceptance} \\ \text{Time} \end{array} \right\}$ (Meeting of minds.)

These elements are the essentials that together make up the whole contract; each contract must have them.

Example. A offers to sell to B 1,000 bushels of wheat at 50c. per bushel; and B accepts the offer. (1) A and B constitute the parties. (2) The transfer of the title to, or ownership in, the wheat is the subject matter. (3) The money, \$500.00, is the consideration. (4) A's offer and B's acceptance constitute the agreement.

Name the elements in the following instances:

1. A, a clerk, offers to work for B, a merchant, for one month for \$50, to which B agrees.

2. The C. M. & St. P. R. R. offers to transport grain for you at the rate of \$75.00 per car. You accept, engaging three cars.

3. You pay the landlord \$25.00 for the rent of an apartment for one month.

4. B shovels the snow from C's sidewalk for 25c.; payment is made.

5. D pays tuition of \$75.00 in the University of Chicago.

6. You get on a street car and pay your fare of five cents.

7. C leaves his horse with B one month, B charging him \$5.00 for feed and stable rent.

16. Division of Contracts According to Form.

SPECIALTY—always written.

PAROL— $\left\{ \begin{array}{l} \text{Written, always express.} \\ \text{Oral } \left\{ \begin{array}{l} \text{Express.} \\ \text{Implied.} \end{array} \right. \end{array} \right.$

1. *Specialty Contract* (often called a deed). A specialty contract is a written contract that is signed, sealed and delivered.

Explanation. The seal is a relic of barbaric times when war was the only occupation of honor. In those days the kings and lords were, as a rule, unable to read and write; consequently, when it became necessary for them to affix their names to any instrument, they did so by means of a stamp, called a seal. By statute it is now customary to write the word "Seal" after the name and enclose it in a scroll, as, F. S. McDaniel (Seal).

2. *Parol Contract.* A parol contract is a contract not under seal. The great majority of contracts are of this character and may be written or oral, express or implied.

(a) *Written Parol Contracts.* A written contract is one in which all the terms are fully agreed to and reduced to writing and which is signed by the parties and delivered, each party usually, but not necessarily, receiving a copy. The writing is said to be the repository of the intention of the parties and is the best evidence of that intention.

(b) *Oral Parol Contracts.* An oral contract is one in which the parties come to an agreement by word of mouth, but the agreement is not evidenced by a written memorandum. An oral contract, in the absence of statute to the contrary, is as binding and as strong as a written contract, but is not so easily proved.

(c) *Express Contracts.* An express contract is one in which all the terms are understood and agreed to by the parties before it is completed. It may be either oral or written. An express contract, if legal, will be enforced by the courts. It is the complete evidence of what the parties have agreed to.

(d) *Implied Contracts.* An implied contract is one in which some of the terms or elements are left unmentioned at the time the agreement is made and entered into. Unless one of the parties to such an agreement has performed what he has agreed to

do, the courts will not enforce the agreement, both because neither party has parted with anything of value, and also because courts are not established for the purpose of making agreements, but for the purpose of protecting in their rights those who have made agreements. If the agreement has been completed on one side, the law contemplates that a contract has been made, and therefore enforces it by supplying the lacking element. There can be no implied contract where there is an express contract covering the same subject matter.

Illustration. A ordered of a cabinetmaker a desk, which was to be made of a certain kind of wood and delivered at his office. The cabinetmaker agreed to do this. The element of consideration is lacking. If the cabinetmaker finally refuses to make and deliver the desk, A cannot sue him, as they did not have a complete contract. If, however, the desk is made and delivered according to agreement, A will have to pay for it although he did not in express terms agree to pay anything; and he will have to pay what the desk is worth in the market. The law supplies the lacking term. In this we see the protective character of the law. As in this case, it is generally the consideration that is the lacking element in an implied contract.

If a person takes goods from a store with the knowledge of the merchant, there is an implied contract to pay for them.

Name the lacking elements in the following examples:

A offers to work for a merchant for one month, the work to commence to-morrow. The merchant accepts the offer.

B on his way to the office leaves an order with the butcher, and the order is filled.

A cord of wood is placed in B's yard. B sees a workman commence to change the cord wood into stove wood, but does not interfere.

You continue to take a newspaper from the postoffice after expiration of subscription.

17. Frequency of Implication. In the affairs of the business world the implied contract is frequently met with. In the hurry of business some term or element is left to be settled later, according to the rules of law. It is not advisable for the man of affairs to enter into more of these contracts than is necessary, as they frequently lead to litigation.

Furthermore, where a person engages to do a certain piece of work for a certain compensation, he impliedly contracts to exer-

cise reasonable skill and care and to perform the undertaking in a workmanlike manner.

✓ **18. Time of Performance.** As to time of performance there may be two forms of contract:

1. *Executed Contracts.* An executed contract is one fully completed, with nothing remaining to be done by either party. In reality, an executed contract is merely the history of what was agreed to by the parties and what has been done.

2. *Executory Contracts.* An executory contract is an agreement entered into by two or more parties for the purpose of establishing contractual rights which are to be carried out at some later period. When the terms have been complied with, it becomes an executed contract.

✓ **19. Validity of Contracts.** 1. *Valid.* A valid or binding contract is one in which are found all of the contractual elements as enumerated at the beginning of this chapter.

2. *Void.* A void contract, on the other hand, is one that is destitute of legal effect. It is not in reality a contract. It is not susceptible of legal affirmation, and third parties cannot acquire bona fide rights under it for value.

3. *Voidable.* A voidable contract is one that may be affirmed or rejected at option by one of the parties. In such an agreement, the party may overlook the defect and ratify the contract in spite of the flaw, or he may disaffirm because of it. But he may lose his right to reject it by taking benefit under it, or by the fact that innocent third parties have acquired rights therein. This cannot occur if the contract is void. If the innocent party desires to repudiate the contract because of fraud he must do so within a reasonable time after learning of the fraud, otherwise he is said to waive his right to reject or deny the contract.

If A is defrauded in a contract with B, the contract is voidable. But A must renounce the contract as soon as he learns of the fraud. The law does not countenance slothfulness; lapse of time is held to be a waiver of one's right to annul a contract.

Examples: White sells goods to Black, being led to think that Black is Brown. The contract is void on the ground of mistake and Black acquires no right to the goods.

A sells goods to B, being led by the fraud of B to think that the market is falling. B resells to M, an innocent purchaser, for value. M acquires a good title to the goods and A is left to his remedy against B for the fraud. This contract was voidable so long as B held the goods.

4. *Unenforceable.* An unenforceable contract, while incapable of being set aside at the option of one of the parties, is one which has obstacles to its enforcement, not affecting its existence as a contract, but only setting difficulties in the way of action being brought or proof given.

Examples of such contracts are those that fail to comply with the Statute of Frauds, and so cannot be proved; those which have fallen under the Statute of Limitations, and can be revived only by an acknowledgment in writing or by part payment being made.

20. RECAPITULATION

The elements necessary to a contract are competent parties, ascertained subject matter, legal consideration, and a meeting of minds.

A specialty contract is a written contract under seal.

A parol contract is one not under seal.

Parol contracts are either written or oral, express or implied.

A written contract is one in which the terms are reduced to writing and signed by the parties.

An oral contract is an agreement by word of mouth.

An express contract is one in which all the elements and terms are definitely ascertained and agreed to by the parties at the time they enter into the contract.

An implied contract is one in which some element or term is lacking. This the law frequently supplies.

An executed contract is one fully completed on both sides.

An executory contract is one wherein something is agreed to be done in the future by one or both of the parties.

21. QUESTIONS

What is a contract? What does the subject of contracts include? Name the elements of a contract. How are contracts divided according to form?

Define a specialty contract. Give examples.

Define a parol contract. Give examples. What is the difference between a parol and a specialty contract?

Define a written contract. Define an oral contract. How do you prove a written contract? How do you prove an oral contract?

What is an express contract? Give examples.

What is an implied contract? Give examples.

As to time of performance how are contracts classed? Define each and give examples.

Define the following as applied to contracts: void, voidable, unenforceable. Give examples illustrating each. What is the difference between a void and a voidable contract? Compare a void contract with one that is unenforceable.

22. DECISIONS BY THE COURTS

1. In *L v. G*, Eng. 1853, G induced a singer who had contracted with L to engage at another place. It was held that G was liable in damages for inducing her to break the contract.

2. In *B v. H*, Eng., the broad principle was laid down that if a third party induces one of the parties to a contract to break it, he is liable for damages.

3. In *A v. B*, A contracted to bore an artesian well for B. He conducted the work so unskillfully that the tools were broken, leaving the auger and a part of the rods one hundred seventy feet below the surface. As a result the well had to be abandoned. It was held that A had failed to use the reasonable amount of skill and care which, in the eye of the law, he had impliedly undertaken to exercise when he entered into the contract, and that B, having received no benefit, was not liable to pay for the work done.

4. In *M v. N*, in a suit to recover the price agreed upon for threshing clover seed by M for N, it was held that if M was employed for that purpose he was bound to perform his task in a workmanlike manner, and if, through his negligence, his want of skill, or his defective machinery, the work was done in such a way that N suffered damage thereby, such damage should be deducted from the price agreed upon for the work.

CHAPTER V.

THE FIRST ELEMENT—THE PARTIES

- 23. INTRODUCTION
 - 1. Definition
 - 2. Duties on Third Parties
 - 3. General Rule
 - 4. Restrictions
- 24. COMPETENCY
 - 1. Age
 - 2. Mind
- 25. INCOMPETENCY
 - 1. Minors—Exceptions
 - (a) Ratification
 - 2. Married Women
 - 3. Aliens
 - 4. Insane Persons
 - 5. Idiots
 - 6. Drunken Persons
- 26. LIABILITY
 - 1. Individual
 - 2. Joint
 - 3. Joint and Several
- 27. RECAPITULATION
- 28. QUESTIONS
- 29. DECISIONS BY THE COURTS

23. Introduction. Let us next consider in detail in this and the following chapters the four elements of the contract. Since one cannot sue himself or engage in an undertaking with himself that may be enforced by law, it is self-evident that there must be at least two parties to every contract.

1. *Definition.* The parties to a contract are those affected by the obligation, and this includes all who are affected in any way by its provisions and who claim gains or may suffer loss.

2. *May Impose Duties on Third Parties.* While as a general rule third parties cannot acquire rights under a contract entered into by others, yet they may become subject to duties and liabilities if they are brought in contact with either party. Where, as was said, one induces another to break a contract, he is liable for damages.

3. *General Rule.* All persons whom the law considers competent are allowed to make contracts. The main requisites are that they be of legal age and have a sound mind.

4. *Restrictions.* From the standpoint of public policy the law shields certain persons from the ill effects of contracts they may make, and denies to others the right of entering into contracts. Still, in the former instance, all persons are in law presumed to have the capacity to contract, and he who would claim exemption from the contractual liability because of incapacity must prove its existence.

24. **Competency.** 1. *Age.* In order to make a binding contract the party must be of age, generally twenty-one years for males and females. Some states, by statute, however, permit females to contract at eighteen.

2. *Mind.* The mind must be of sufficient acuteness to discern the meaning of the undertaking, as the law contemplates a "meeting of minds."

25. **Incompetency.** Incompetency is divided into two classes, legal and natural. Minors, married women, and alien enemies are legally incompetent; profligates, drunkards, lunatics, and idiots are naturally incompetent.

1. *Minors.* A minor or infant is a person under the age of legal majority. From the standpoint of public policy, contracts relating to business which are made by a minor are declared voidable; that is, he has the privilege of abiding by his agreements or of declaring them to be of no force. This right is his to protect

him against agreements that he might make with those who would attempt to take advantage of his youth. The right is not given that he may defraud. If a minor makes a contract and then refuses to perform it, he must, if possible, return the benefit received. If, for instance, he buys a horse and gives a note in payment, he may refuse to pay when the note falls due, but he must return the horse. If, however, he has sold the horse and used the money, he cannot be compelled to return any value to the holder of the note.

This disaffirmance of a contract may be made during minority only when it relates to personal property. But a disaffirmance in a conveyance of land cannot be made before majority. The minor may accept the rents and profits during minority and still disaffirm later. No particular form of disaffirmance is necessary. Any act inconsistent with ownership or with the existence of the contract and showing an intention not to be bound, is sufficient. The disaffirmance must be complete—he cannot disaffirm part and retain part. Disaffirmance renders the contract void from the beginning the same as if there had been no contract. “The rule seems to be that where an infant acquires an interest in permanent property to which obligations attach, or enters into a contract which involves continuing rights, duties, benefits, and liability, and has taken benefits under the contract, he will be bound unless he expressly disclaims the contract. On the other hand, a promise to perform some isolated act, or a contract wholly executory, will not be binding upon the minor unless he expressly ratifies it upon coming of age.”

The minor may always enforce a contract against an adult; he may not, however, enforce against the adult and reject his own part of the contract to be performed. The right to disaffirm is personal to the infant, and he alone can take advantage of it during his life and sanity. Upon his death, or if he becomes insane, his contracts may be avoided by his heirs, personal representative, conservator, or guardian.

Exceptions. Contracts made by minors for board, clothing, instruction, and medical attendance, which are classed as necessities, are valid

and enforceable to the extent of the reasonable value of the articles furnished or the services rendered. What are necessities is a question of fact and will depend upon circumstances, taking into consideration the station in life of the infant. What would be called necessities in one case might in another case be called luxuries.

These articles must not be for ornament or pleasure merely, but for use; and the quantity must be reasonable. If the infant lives at home and is supported by his parents, he is not liable for necessities. The things furnished him must concern his person and not his estate. Persons dealing with an infant do so at their peril, and the burden is upon them to show that the actual circumstances were such that the things furnished were necessities. If a minor agrees to pay \$25 for a suit of clothes that is worth but \$15, he cannot be compelled to pay more than their value, his agreement to the contrary notwithstanding.

While a minor is not bound for what may be termed business contracts, he may, nevertheless, on attaining his majority, ratify such contracts made during his minority. His liability then becomes complete and binding from the beginning—but it must be as to the *whole* contract, it cannot be in part.

(a) *Ratification* may be brought about in several ways. If, upon arriving at majority, the minor makes an absolute promise to live up to an agreement formerly made, he is bound; no new consideration is necessary; he simply waives a right. Secondly, a mere acknowledgment is not sufficient. If the promise is conditional, the condition must be performed before liability accrues. This ratification must be made knowing that there is no liability. Some states require a written acknowledgment and promise to perform. Ratification of agreements may result from acts; as where the contract was continuous and the minor continues to receive the benefits of the agreement after he reached his majority. After ratification has been made the contract is binding, and suit may be maintained upon it. Before this the minor would in effect say in court, "I was under age when I made the agreement and do not wish to be held liable."

2. *Married Women.* The common law regarded the rights of a married woman as merged in those of her husband; therefore, she had no contractual rights. The common law has been so greatly changed and modified of late that in most states a

married woman's rights are similar, or equal, to those generally defined as pertaining to parties in general.

3. *Aliens.* An alien is a person who owes his allegiance to a foreign country. While the respective countries are on terms of friendship and peace, all contracts that are allowed in general are binding between aliens and citizens; but in some jurisdictions aliens either cannot acquire and hold land, or are permitted to acquire and hold it only for a limited time. In case of war they are called alien enemies, and all contracts made during the continuance of the hostilities are void; the contracting parties would even be liable to punishment. If an alien enemy is sued upon a contract entered into during peace, he may defend the suit. Contracts that were made prior to the declaration of war are merely suspended during the hostilities. The reason for this standing of contracts with aliens is two-fold: first, to prevent a citizen from becoming antagonistic to his country through eagerness for trade, and secondly, to prevent the withdrawal of a country's resources that doubtless would be an aid to the enemy.

4. *Insane Persons.* A contract made by an insane person or one who is *non compos mentis*, is as a rule void. The following contracts, however, are valid and binding: (1) Contracts created by law. (2) Contracts for necessities furnished the insane person, his wife, or his children. (3) In many states, where the sane party acts in good faith without any knowledge of the other's insanity, and the contract is so far carried out that he cannot be placed in his former position, the contract will be valid. In most states, however, contracts by a person who has been judicially declared insane and placed under guardianship, are declared to be absolutely void.

A person is *non compos mentis* in a given instance when, by reason of idiocy, lunacy, monomania or any other defect of the mind, he is at the time of entering into the transaction in question incapable of understanding its nature and effect. The voidable contract of an insane person may be ratified or avoided by himself when sane, by his guardian during the time his ward is insane, or by his heirs or personal representatives after his

death. The right to disaffirm is personal, and a third person cannot avoid the contract.

The law makes the very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may void; it holds the sane to the obligations from which the insane may be loosed. It intends that he who deals with infants or insane persons shall do so at his peril.

5. *Idiots.* Idiocy is a deficiency in the proper conception of things. The distinction between insanity and idiocy is, in one case, *loss* of intellect, and, in the other, *lack* of intellect, generally from birth. A contract formed with an idiot is always voidable, and in many cases absolutely void. The general rule, however, relating to necessities of life is recognized.

6. *Drunken Persons.* A contract entered into by a person so drunk as to be incapable of understanding its nature and effect is voidable at his option, except that he is liable on contracts created by law, and for necessities. The rules of ratification and disaffirmance are here substantially the same as in the case of infants and insane persons.

26. **Liability.** While all contractual agreements result in benefits and liabilities, the latter are variously classed as follows:

1. *Individual.* This is the liability of a single person in any contract or agreement; as, A agrees to pay or to sell or to work. These illustrate individual liability on the part of A.

2. *Joint.* In this the liability is divided between several. If A, B and C together promise or pledge, each one is liable in proportion to the number promising, but only for his part, in this case one-third.

3. *Joint and Several.* This is the result of an obligation assumed by several; not only are the parties liable as in the second case, but each one is also individually liable for the whole liability. If, however, one performs the whole, he may call on the

others for their share. Owing to the difficulty in effectually enforcing joint obligations, many states have enacted laws to the effect that all joint liabilities shall be joint and several.

27. RECAPITULATION

The chief elements of capacity in parties to contracts are, being of age and having a sound mind.

A minor may ratify or disaffirm his contract upon reaching his majority; some contracts he may disaffirm during minority.

Disaffirmance renders a contract void from the beginning.

Ratification completes the liability and makes the contract binding from the beginning.

Disaffirmance or ratification must be complete; an infant cannot disaffirm in part and ratify in part.

Contracts by a minor for necessities are binding.

In general, at the present time, the rights of a married woman to make contracts are the same as those of any other person.

Contracts made between citizens and aliens during war between their respective countries are void.

Those contracting with infants and insane persons do so at their peril.

28. QUESTIONS

Define parties. What relations may third parties sustain to a contract? Who are competent to contract? What are the grounds of incompetency?

What is a minor, and when may he make a valid contract? When may the voidable contract of a minor become valid? What rights has a minor against an adult with whom he has contracted?

Distinguish between rights relating to personal and real property. What are necessities?

Distinguish between the rights of a married woman under the common law and at the present time.

What powers to contract have aliens? Insane persons? Idiots? Drunken persons?

Define individual liability. Joint liability. Joint and several liability.

29. DECISIONS BY THE COURTS

1. In *W v. D & G*, 14 Mass. 457, D and G, a minor, were partners. D executed and delivered a promissory note in the firm name, D & G. Upon attaining full age, G ratified the note, but upon being sued he contended that as he did not sign the note in person it was not only

voidable, as to him, but void and not subject to ratification. The Supreme Court held to the contrary and affirmed a judgment in favor of the plaintiff.

2. In *McK v. M*, 61 Ill. 177, M paid the expense of an infant on a trip to California, and sought to recover for the same on the ground that such expenses were necessities. There being no proof that the trip was necessary for the infant's health, or that it served any purpose other than pleasure, it was held that the infant's estate was not liable for such expense.

3. In *S v R*, an infant sold a horse, and upon the question whether he could avoid the contract during his minority, it was said: "The true rule appears to be this, that where the infant can enter (as in the case of land) and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed and there is no legal means to regain and hold in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately."

4. In *A v. B*, 6 Metc., Mass. 415, B, while insane, sold a tract of land to A, and after restoration to sanity received payments upon the same. B contended that the deed made while he was insane was void, and that it could not be ratified. The Court held it voidable only and subject to ratification.

5. In *M Co. v. H*, 79 N. Y. 541, H had executed a mortgage and had received the benefit under it. It was alleged that she was insane. Under the maxim that "he who seeks equity must do equity," it was set forth that the defendant could not retain the benefit of the contract and at the same time deprive the plaintiff of its remedies, and it was said that an executed contract, when the parties had been dealing fairly and in ignorance of the lunacy, should not afterwards be set aside. A contrary doctrine would render all ordinary dealings between man and man unsafe.

6. In *B v. B*, 2 Ark. 167, the parties had exchanged land, and the defendant executed his note for \$1,000 difference. Later he refused to receive a deed from the plaintiff or to pay the note, and offered to prove that at the time of the transaction he was drunk. The Supreme Court held that if he was incapable of exercising his understanding so as to be able to contract, such evidence was admissible.

CHAPTER VI.

THE SECOND ELEMENT—THE SUBJECT MATTER

- 30. INTRODUCTION
 - 1. Definition
- 31. FORBIDDEN CONTRACTS
 - 1. Contracts Contrary to Statutory Prohibition
 - 2. Contracts Contrary to Common Law Prohibition
 - 3. Contracts Against Public Policy
- 32. WAGERING CONTRACTS
- 33. CONTRACTS MADE ON SUNDAY
- 34. CRIMES AND CIVIL WRONGS
- 35. SALES AT AUCTION
- 36. PUBLIC POLICY CONTRACTS
 - 1. In Restraint of Marriage
 - 2. In Restraint of Trade
 - 3. Restrictions
- 37. EFFECT OF ILLEGALITY
- 38. RECAPITULATION
- 39. QUESTIONS
- 40. DECISIONS BY THE COURTS

30. *Introduction.* Great latitude is permitted in making contracts, and only those that are judged to be against the best interests of the community are forbidden. The broad principle of the law applies, which is to permit one to make all contracts that are possible, denying only those that are considered objectionable on grounds of public policy and good morals.

1. *Definition.* The subject matter of a contract may generally be defined as that which is to be done or that which is to be left undone.

Since the fundamental principle of our law is to allow everything except what is forbidden, it is necessary to discuss only those agreements that are illegal or forbidden. Certain agreements that are not allowed or not enforced, are prohibited largely from the standpoint of public policy and as a matter of protection to the public rather than to the individual.

31. Forbidden Contracts. The following are the classes of contracts forbidden or discouraged:

1. *Contracts contrary to Statutory Prohibition.*
2. *Contracts contrary to Common Law Prohibition.*
3. *Contracts against public policy or good morals.*

32. Wagering Contracts. Any contract that relies upon chance to determine the winning or result of the agreement is termed a wagering contract. The consideration is a certain sum that is payable by one to the other according to the result, while the loser receives no benefit. At common law such agreements, while not favored, were enforceable. By statute they are generally declared illegal, and money so paid may be recovered. Great difference is found in the different states, yet there is a general uniformity of decisions that wagers exclusively for gain are not enforceable.

33. Contracts Made on Sunday. Again, the common law recognized no difference as to the day of contract; statutory law, however, has seen fit to enact that general business agreements may not be made on the Lord's day. Thus a contract of hire, an exchange of property, a loan of money, a demand of payment, and the making and delivery of a deed, made on the Lord's day, all have been held to be illegal contracts. Contracts for necessities of life or of a charitable nature are enforceable, and so are contracts to preserve property.

Similarly, an enforceable contract cannot be revoked on Sunday. There is, however, a great difference of opinion as to whether a contract made on Sunday can be ratified later or not.

34. Crimes and Civil Wrongs. Any contract that is formed whereby an agreement is entered into to commit a crime,

such as to commit an assault or to publish a libel, is illegal. All contracts of bribery of public officers, of a jury, etc., since they tend to prevent a faithful performance of public duty, are illegal. Contracts, the consideration of which is based upon acts of immorality, are illegal. All contracts whereby an agreement is entered into between two to defraud a third party are void. All transfers of property with the aim of defrauding creditors may be avoided. An adjustment of a debt by an insolvent debtor with one creditor to the detriment of others is illegal.

35. Sales at Auction. Any agreement entered into whereby fair competition is prevented at an auction is void. The employment of puffers or by-bidders for the purpose of enhancing value, is illegal. The puffer cannot enforce his contract of sale, but a buyer may avoid his purchase if the bid immediately preceding his was fictitious. But an announcement stating that the goods will not be sold for less than a certain sum is legal.

36. Public Policy Contracts. Contracts that are not allowed on the ground of public policy, are declared illegal not because of a statutory enactment, but because such agreements encroach on the interest of the general public. Under the two former prohibitions the individual was considered; here the individual is not so much considered as is society. A contract to "corner," or control, the production of a commodity is void on account of public policy. If an agreement injures an individual, such an agreement injures the community at large, and this is the consideration that determines its prohibition. A contract to pay an additional fee to a public officer for regular services performed, is void; first, because of want of consideration, and second, the act tends to corrupt public servants.

1. *In Restraint of Marriage.* Any agreement whereby one is bound, generally not to marry, is void as against public policy. But if such restriction is limited in its scope as to a reasonable time, or as to certain individuals, it may be enforced.

2. *In Restraint of Trade.* Since the prosperity of the individual and the community is best served by allowing everyone

freedom in making contracts, the law declines to enforce agreements in which a person agrees never again to enter into a particular line of work. Such agreements tend to restrict one's ability to earn a living. The public is deprived of one's service, and a tendency to promote monopolies results.

3. *Restrictions.* Reasonable restrictions upon trade as to time and territory, are binding. What are reasonable restrictions depends upon all the circumstances of each particular case. Agreements, for instance, whereby the seller agrees not to engage in competition for a short time, a few years, are generally considered binding. An agreement not to engage in the same business within certain limited territory is considered binding, or an agreement to pay a reasonable sum of money in lieu of damages in case of entering into competition, is binding. But a contract never to engage again in the same business is void as being against public policy.

37. *Effect of Illegality.* If the illegal contract has already been carried out, as where money has been paid or property delivered, it can in general be recovered. Especially is this true where the losing party is not in the wrong. A wrongdoer cannot take advantage of his own wrong to recover his consideration. Where both parties are equally culpable in law, the court will leave them where it finds them, so far as enforcing the contract is concerned, although they may be prosecuted criminally where the act amounts to a crime, as where a bribery was attempted.

38. RECAPITULATION

The subject matter of a contract is the thing to be done or omitted. Wagering contracts are void and cannot be enforced. If, however, money has been paid, it may be recovered.

Contracts, the subject matter of which is a crime or an immoral act, are illegal; likewise contracts entered into between two persons whereby a third person is to be defrauded.

By-bidding at auction sales may make a contract voidable.

Contracts made in general restraint of trade, or of marriage, are void as being against public policy. But if the restraint is limited in its scope and is reasonable, they are valid and binding.

39. QUESTIONS

Define subject matter. On what grounds are certain contracts forbidden? What is a wagering contract and how is it treated in law?

A contracts with B to blow up the Court House. B proceeds to do so. A refuses to pay the price. Can B recover? Why? If A had paid the money could he recover from B?

What practice will avoid an auction sale? Discuss public policy.

When is a contract in restraint of marriage? When is a contract in restraint of trade? To what extent will restraint be considered reasonable?

40. DECISIONS BY THE COURTS

1. In *A v. J*, 43 Vt. 78, plaintiff published an item in his paper at the solicitation of the defendant that was a libel of one G. A bond to indemnify plaintiff was given by defendant. Judgment was secured by G against the publisher, and action was brought by the plaintiff against defendant to recover on the bond. Held that the indemnity bond was illegal and therefore non-enforceable. The court said, "I know of no case in which a person, who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the offense."

2. In *L v. S*, 6 Vt. 291, the parties contracted for and did exchange certain goods on a Sunday, with a warranty on one horse. The suit was brought on the warranty. Held that as said contract and warranty were made on Sunday they were not enforceable.

3. In *B v. L*, 58 N. Y. 442, defendant, a clerk in U. S. Treasury, sold and assigned a month's salary, and when the salary became due he collected and used it. Suit was brought to recover same. Held that from motives of public policy the defendant's interest in his salary was not assignable, that if such assignments were recognized the service would become inefficient as the employes might not have sufficient balance for proper support. "A pension for past services may be alienated; but a pension for supporting the grantee in the performance of future duties is inalienable."

4. In *H v. B*, Atl. 17, R. I. 13, the defendant contracted to teach French for the plaintiff and contracted not to teach French anywhere within the state for a period of one year after said term of service expired. Contended that contract was void on the ground of public policy, also that contract was unreasonable. A contract is not, however, necessarily either void or unreasonable because the restriction covers one or several states. Conditions are constantly changing. What is unreasonable now may not be unreasonable to-morrow. In determining the

solution one must decide whether the restriction is necessary, whether it benefits one of the parties. "Wherever a sufficient consideration appears to make it a proper and useful contract, such as can not be set aside without injury to a fair contractor, it ought to be maintained—but with this constant diversity, viz., where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party and only oppressive." It was held that since the teaching was in another town, and not necessarily detrimental, the contract should not stand.

5. In *S v. H*, 20 Atl. 232, 17 R.I. 109, the plaintiff agreed to work for defendant as clerk in a grocery and liquor store, the sale of liquor being illegal. Recovery sought for salary earned. Contended that the contract was illegal. Held, had one price been agreed upon for the services as bar-tender and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for those services which were legal; but, as it was, the defendant's contract being entire, and consideration for it being partly legal and partly illegal, and indivisible, both parties were to be regarded as equally in fault, and the law will lend its aid to neither.

6. In *D-M Co. v. R*, 106 N. Y. 473, the defendant contracted to sell and did sell his business to plaintiff, engaging not to become a competitor for ninety-nine years in all states and territories of the United States except Nevada and Montana. Defendant also became a stockholder in the new firm and was placed on a salary which he afterward personally relinquished. He then engaged with a rival house. It was contended that the contract was in general restraint of trade and therefore void. Where the restraint is general but at the same time is co-extensive only with the interest to be protected and with the benefits to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is no corresponding partial restraint. Is the seller any more likely, if such a contract is permitted, to become a burden on the public than a man who, having built up a local trade, only sells it, binding himself not to carry it on in the locality? It is clear that the public policy and the interest of society favor the utmost freedom of contract within the law and require that business transactions shall not be trammelled by unnecessary restrictions. The defendant realized a large sum of money and also became interested as a stockholder in the business he had sold. Held that the covenant, being supported by a good consideration and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, was valid and not void.

7. In *A v. T*, 19 Pick. Mass. 51, the parties enter into an agreement for valuable consideration wherein one is not again to engage in business as an iron founder. Held that notwithstanding the consideration the contract, being in total restraint of trade, is invalid as against public policy.



LORD MANSFIELD—WILLIAM MURRAY

LORD MANSFIELD—WILLIAM MURRAY (1705-1793)

Lord Mansfield was educated at Westminster, Christ Church, Lincoln's Inn, and Oxford. In 1730 he was called to the bar. He took an active part in politics as well as in the law, was a leader in the House of Commons, and during this time there defended the prerogative of the king. In 1783 he was speaker of the House of Lords. Prior to that, in 1756, he was appointed to the position of Chief Justice of the King's Bench and created Baron Mansfield. He was made Earl of Mansfield in 1776.

The great reputation of Lord Mansfield rests chiefly on his judicial career. He has always been recognized as the organizer of mercantile law which he found in a chaotic condition, leaving it in a condition equivalent to a code. He was pre-eminently one of England's greatest jurists.

CHAPTER VII.

THE THIRD ELEMENT—THE CONSIDERATION

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41. Introduction. In law every agreement, or contract, as it is usually called, must include something, capable of being reduced to money value, that passes from one party to the other. In the eye of the law, there must be in every agreement a benefit to the promisor or a detriment to the promisee. It is not necessary that the exchange of values should be equal, that being a matter of opinion between the parties themselves. The law does not attempt to enforce against a person a promise of a gift or any promise of a similar nature.

1. *Definition.* The consideration is the value attached to the thing to be done or left undone. This consideration is sufficient if it consist in "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Again, the benefit need not necessarily pass to the party making the promise, but may pass to a third party. A offered to work for B for one month for \$100.00, to which B agrees. The \$100.00 is the consideration.

If A makes a promise to B for the benefit of C, which is accepted by B, C may have action to enforce the acquired rights.

42. General Rules. 1. *Requirements:* (1) Necessity of consideration when contract is not under seal. (2) Adequacy of consideration. (3) Legality of consideration. (4) Present or future, executed or executory, but not past.

2. *Necessity.* Every man is bound to fulfill his agreements, but the law does not lend its aid in enforcing a contract or agreement that is not founded on a consideration. It is one of the essential elements and is that which marks the difference between a gift and a contract. A gift is never presumed. A promises to B a certain valuable picture. B cannot enforce this promise as it is not founded on a consideration. The court would say that B has not parted with anything of value or been to any inconvenience. On the other hand, A promises to deliver the picture to B for \$5 and B accepts. This is a contract. B may enforce this agreement upon making a tender of the money. Each has

promised to part with something of value, which is the consideration.

3. *Adequacy.* The value of the consideration is not considered so long as a man gets what he has bargained for. Courts do not inquire into the equality of the bargain. The question is, "Was there a consideration, something of value given, or a detriment sustained?" The adequacy of the consideration is left entirely to the parties to the agreement; otherwise it would be "the law making the bargain instead of leaving the parties to make it."

4. *Promise Without Consideration.* A bare promise not supported by a consideration will, as was said, not be enforced by the courts. Moreover, if the thing promised has been carried out with a knowledge of both parties, the courts will not assist in enforcing the return of the thing promised. A may promise to give B a suit of clothes, or a father may promise his son a deed to a piece of property at his majority. These are bare promises and the courts will not assist B or the son in enforcing compliance. Moreover, if the clothes have been delivered, or the deed has been delivered, the givers will not be allowed to compel a return of the property or demand payment therefor. But if A agrees to sell to B a horse for \$100.00, and B accepts and pays the money to A, and if, when he calls for the horse, it develops that the horse was dead at the time of the sale, then this is deemed a failure of consideration, and the money received must be returned. When the promise or agreement is to be carried out in the future, it is said to be an executory agreement. When the delivery has been made, it is said to be an executed agreement. If there is no consideration the first is not enforceable, but the second, being completed, is binding.

Exception. If a party gives away his property without a consideration or for a grossly inadequate one, and by so doing is unable to pay debts already contracted, his creditors have a right to have the transfer set aside. A, who is about to fail in business, transfers a large amount of his property to B in order to keep it from his creditors. So far as A and B are concerned the transfer will stand, but the creditors who are thus deprived of payment may recover enough of the property from B to satisfy their claims.

5. *Impossibility.* If a contract is entered into which it is impossible to perform, it is void. The impossibility must be in the act rather than in the party who is to perform. If the act is impossible for the party promising, but possible for others, it is his duty to perform. If A promises to release B from a debt due C, it is an impossibility from a legal standpoint. He must have authority to act. The promise of D to E on May first that a certain debt then due shall be paid by March first of the same year, is an impossibility and therefore void.

6. *Moral Obligations.* In enforcing agreements the courts look for a consideration, a benefit, or a detriment; hence, if nothing but a moral obligation is found to exist, it will not be enforced. In the eye of the law, no loss has been sustained, therefore no remedy can be had. It is not that the law refuses to countenance morality, but that the courts can only measure damages from the standpoint of gain to one party and loss to another. All men should live up to all promises made, but to be enforceable they must be based upon consideration. If payment has been made or any other performance had, a recovery for such may be made.

7. *Past Consideration.* A past consideration is receiving a benefit for which there is no legal obligation to reimburse. If, after receiving the benefit, the person assisted promises something of value as a recompense, the promise is not enforceable; e. g., A assists his neighbor, B, in putting out a fire. Sometime afterward B says he will give A a cow in payment for his services in helping to put out the fire. This agreement is not founded on a consideration and is therefore not enforceable. If, however, A had requested the other to do what he did, the law would imply a consideration which would be sufficient to support the subsequent promise or agreement.

8. *Mutual Promises.* Mutual promises will support each other, as each promise is the consideration upon which the other is based.

9. *Part Payment of Debt.* "The payment of a smaller sum in satisfaction of a larger is not a good discharge of the debt."

The debtor agreed to pay the debt in full; the part paid is but a consideration for that part of the debt; there is then no consideration for the balance. A Owes B \$100.00. He pays \$80, receiving a receipt in full and B's assurance that the debt is satisfied. B may nevertheless sue for \$20, the balance. But if the debt is not due it may be cancelled by the payment of a smaller sum, since payment before maturity is a benefit conferred and therefore a valuable consideration.

Exception. If the debtor does something different from what the creditor is entitled to demand, the debt may be cancelled by what in reality is a smaller sum. A owes \$100. If A gives B \$50 and a parrot in satisfaction of the claim, or pays a certain sum of money and a certain amount of labor, or makes the payment at a different place, the debt may thus be fully canceled. The parties may agree to any value to the part that is different and they will be bound thereby. No such payment can, however, be made without the consent of the creditor.

43. Form. The law establishes no particular form to many contracts, the fact that there is a contractual relationship being usually sufficient. Yet, in the making of a few kinds of agreements, because of the character of the subject matter and because of the fallibility of human mind, the law directs a certain form and solemnity.

1. *Statute of Frauds—History.* Over two hundred years ago the Parliament of England enacted one of the most important of written laws; viz., "An act for the prevention of frauds and perjuries." This act is known as the Statute of Frauds. Its influence extends throughout the English speaking world, and this act has been re-enacted in nearly every country under the authority of Great Britain and in nearly every state in the Union. Yet, enough modifications have been made to render it necessary, in all questions under this act, for the student to refer to the statute laws of his particular state.

44. Classes. The formality of contracts will be discussed under two heads:

1. *Formal Contracts.* These depend for their validity upon a specified form. Such are deeds, and, in fact, all contracts that

are required to be under seal. The seal is said to import a consideration, or rather dispense with the necessity of proving one.

2. *Simple Contracts.* These depend for their validity upon consideration. They are subdivided into two classes: those that the law directs shall be formal and in writing in order that the evidence of the existence of the contract may best be preserved, and those that may or may not be in writing at the discretion of the parties to the contract.

45. **What the Law Requires.** The legal requirement is simple, the chief requisite being that some note or memorandum of the agreement shall be made, containing a description of the subject matter, stating the consideration for the same, and carrying the signature of the party to be charged or made liable. In order to protect both parties to the agreement, both should sign, as otherwise the contract would be enforceable from but one side.

46. **What the Law Includes.** It is now well established that the Statute of Frauds refers only to executory contracts.

47. **Effect of Non-Compliance.** The direction of the law is that the substance of the agreement must be reduced to writing. If this direction is not observed it does not affect the validity of the agreement. It directs, "No action shall be brought unless the agreement is in writing and is signed." The agreement is therefore unenforceable but not void. If the parties have formed the agreement verbally, they may still carry it out and their action will be legal, but the court will not lend assistance in enforcing the agreement.

48. **Ratification.** An agreement orally made contrary to the Statute of Frauds may be finally reduced to writing and signed and thereby become enforceable. The statute rather aims to secure written evidence of the contract in order that fraud may be prevented.

49. Provisions of the Statute of Frauds. This law enacts that "no action shall be brought:

(1) To charge any executor or administrator upon any special promise to answer damages out of his own estate, or

(2) To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or

(3) To charge any person upon any agreement made in consideration of marriage, or

(4) Upon any contract for the sale of land, tenements, or hereditaments, or any other interest in, or concerning them, or

(5) Upon any agreement which is not to be performed within the space of one year from the making thereof,

Unless the agreement upon which such action shall be based is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

Following the enactment of the above, was an act relating to the sale of personal property, to-wit:

"No contract for the sale of any goods, wares or merchandise for the price of ten pounds or upwards shall be allowed to be good, unless: A part of the goods so contracted for shall be delivered, or a part of the purchase price be given to bind the contract, unless the contract or agreement thereto be in writing and signed by the party to be charged."

A number of the phrases above need explanation. Let us consider them.

1. *Promises of Executors and Administrators.* An executor or administrator is one appointed for the purpose of winding up the affairs of a deceased person. He is not personally liable except that he must follow the law in the distribution of moneys and payment of legal debts. If he personally agrees to pay some claim of the estate, his promise is not binding unless in writing. However, if he personally agrees to pay a certain sum to an heir if he will not contest the will or bring suit, he will be obliged to live up to this agreement, whether in writing or not, as the agreement is an

original undertaking. A consideration must be shown for the agreement.

2. *Debt, Default, and Miscarriage.* When one agrees to answer for the debt, default, or miscarriage of another, three persons are considered: (1) debtor, (2) creditor, (3) the stranger who agrees to pay the debt for the debtor and against whom no previous liability existed.

(a) *Nature of Agreement.* The agreement may be original or collateral on the part of the stranger. If original, the agreement is without the statute and need not be in writing; if collateral, that is, dependent upon the debtor's paying, it is within the statute and must be in writing. For example, A says to B, "Let C have \$100 credit at your store, and if he does not pay I will." This is a collateral undertaking, and it is not binding unless put in writing and signed by A. If he says, "Let C have credit for \$100 and I will pay you," the agreement is original and is binding even though not in writing. If the debt has already been contracted, a new consideration must be given when the promise to pay is made by the stranger. This may be accomplished by the payment of something of value or by extending the term of credit.

3. *Agreements in Consideration of Marriage.* This statute does not relate to the contract to marry which is based upon mutual agreements, but rather to agreements prior to and collateral to marriages; as, where one of the parties to the marriage agrees to make a settlement of a certain sum of money on the other, or a parent or some third party says, "Upon your marriage to a certain person I will deed to you certain property." Subsequent marriage will not take the contract out of the statute. All such agreements must be in writing to be enforced.

4. *Agreements for the Sale of Lands.* The word land here is used in the broad sense of including not only land itself, but all claims thereto of a permanent character.

5. *Agreements Not to Be Performed Within One Year.* This clause relates to contracts that from their nature, or from the time when they are to begin, cannot be performed within the

space of one year from the time they are made. The vital question is not was the contract performed within the prescribed time, but was it capable of being performed within a year from the date of making. If A contracts with B to-day to work for him one year, beginning the first of next month, this is clearly within the statute. A contracts with B to work two months for him, but no time is mentioned as to the date of beginning. The agreement is without the statute and need not be in writing—it is capable of being performed within one year.

6. *Sale of Goods.* Many questions rise under this section that make the settling of the question difficult. There are probably more decisions under this section that cannot be reconciled than under any statute ever enacted. One reason for this lack of uniformity is that generally a side element causes the trouble, such as an element of labor in a contract for the sale of certain chattels. The decisions divide on whether it is a sale of goods or a contract for labor.

(a) *Effect of Non-Compliance.* A few states have excluded altogether this section of the Statute of Frauds relating to the sales of personal property. Unlike the first section, this enacts that the contract shall not be good, therefore a failure to reduce the agreement to writing would make the agreement void and not merely unenforceable.

50. RECAPITULATION

A consideration is essential to every contract. It is the value attached to the thing to be done or omitted.

It may consist of "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." The benefit may pass to a third party as well as to the one making the promise.

Inadequacy in itself is no defense.

A naked promise unsupported by a consideration is unenforceable.

A transfer of property in fraud of creditors is voidable as to them and may be set aside in their behalf. As between the parties to the transfer it is binding.

A performance that is impossible in itself is unenforceable.

An agreement that has for its consideration merely a moral consideration is unenforceable at law.

A past consideration is not sufficient to support a promise unless such past consideration was done or suffered at the request of the one making the promise.

Part payment of a debt due in cancellation of the whole debt is no defense for the balance of the debt.

A larger debt may be canceled by the payment of a smaller sum and the addition of something different.

Mutual promises supply the consideration to support each other.

The Statute of Frauds directs that the evidence of certain contracts must be in writing and signed by the party to be charged.

51. QUESTIONS

Define consideration.

What effect does inadequacy of consideration have on a contract? Why?

Can a promise not supported by a consideration be enforced?

When will inadequacy of consideration be a ground for setting aside a contract?

A contracts to do a thing which is impossible of performance. Is he liable under the contract? A contracts to do a thing that is impossible for him to perform, but possible for someone else. Is he liable?

Is a contract enforceable that is based purely on a moral consideration? Why?

Is a past consideration sufficient to support a contract. Discuss fully.

When will the part payment of a debt discharge the whole debt? And when not?

A owes B \$500. With B's consent he pays him \$200 and a horse in satisfaction of the debt. Does this discharge the debt?

What is the purpose of the Statute of Frauds?

What are formal contracts? Simple contracts?

Enumerate the main provisions of the Statute of Frauds and discuss each one.

52. DECISIONS BY THE COURTS

1. In *V v. F*, 3 Ill. 263, it is held that the body of an instrument itself that is sealed is not sufficient. It must in fact be signed and sealed.

2. In *J v. J*, *Craig & Ph.*, 138, a contract under seal was executed, wherein one agreed to transfer certain realty to the other, but no consideration was recited. Held that a court of equity would not decree specific performance.

3. In *E v. K*, K promises E that if he will act as surety for A, he (K) will reimburse him. This is a primary promise and need not be in writing.

4. In *N v. W*, 7 Kans. 373, W orally promises to marry N in three years. Held that this promise is not binding, as the statute directs a written promise. (This promise is not affected by the law relating to the ordinary agreements to marry.)

5. In *R v. H*, H, an administratrix, gave a written promise to answer damages out of her own estate. Held not enforceable for want of a consideration.

6. In *H v. H*, 12 Gray, Mass. 341, a receipt in full was given for part payment of the balance. The receipt in full was held to be no bar to suit for the balance of the debt.

7. In *M v. W*, 3 Pick., Mass. 207, an adult was taken sick among strangers, who cared for him until his death. Subsequent to his death his father promised to reimburse. Held that this promise was not obligatory, as the consideration was past.

8. In *W v. E*, the parties enter into an agreement to defraud the creditors of one of the parties. Later W sued E on this agreement, which is a bond. Held not enforceable, as the illegal nature of the agreement may be shown and thus defeat a recovery.

9. In *N v. McC*, 5 Minn. 382, the parties entered into a contract which did not comply with the Statute of Frauds. The contract was, however, carried out. Held that N could not subsequently recover the money paid on this agreement.

10. In *H v. V*, 10 A. & E., R. I. 309, B promised H that if he would return a certain guaranty given to him by A, that he (B) would pay certain bills. Guaranty was returned and was found to be unenforceable. Nevertheless, its return was held to be a sufficient consideration for B's promise.

11. In *W. v. S*, one party sued another on a cause of action known to be without foundation. A promise was given to pay if suit was discontinued. Held that this was unenforceable for want of consideration.

12. In *B v. B*, the principle is established that where the parties enter into a contract upon insufficient consideration, as where a claim of \$100 now due is settled by giving less than \$100 and a receipt in full is given by one of the parties, this does not prevent subsequent action to recover the balance.

CHAPTER VIII.

THE FOURTH ELEMENT—THE AGREEMENT

53. INTRODUCTION

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55. APPARENT CONSENT

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 - (a) Effect
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 - (a) Effect
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 - (b) Effect of Fraud
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56. RECAPITULATION

57. QUESTIONS

58. DECISIONS BY THE COURTS

53. Introduction. The fourth element in a contract contemplates that both parties have complete knowledge of the facts and that they know they are forming a legal relationship. It may be that where the words show consent the law may look beyond to determine whether the apparent consent is in fact consent as required by the law. There must be a "meeting of minds" to satisfy the law.

1. *Definition.* Agreement is the formation of a distinct common intention to do or not to do a particular thing. This agreement may be either express or implied. It is express where the terms are fully understood and consented to by both parties; implied where from the acts or relationship of the parties the law presumes a contract has been made and supplies the lacking element in order to properly adjust and protect their rights and liabilities. The law, however, does not establish a contract where the partial agreement relates wholly to an executory agreement. A benefit or detriment must have been sustained.

The agreement may be resolved into two elements; viz., offer and acceptance. They frequently take the form of question and answer; as, "Will you give me \$100 for this horse?" "I will." This is an express agreement.

2. *Offer.* The offer is the first step toward making a contract, and is simply a proposition or a question; as, "I wish to buy," "I wish to sell," or "Will you buy?" Since it affects but one party, it may be withdrawn at any time before acceptance by the other party.

3. *Acceptance.* Acceptance is the step taken by the second party to the contract relation whereby the offer of the first party is assented to. Unlike a proposition, it cannot be withdrawn. It completes the contract, and affects the legal relations of both parties. There must be a communication of the mutual intentions of the parties in order that an agreement may result. A secret, unexpressed intention to accept cannot in any way affect the relations of either party.

Illustration. "I will sell you this horse for \$100," is a proposition. The following would be an acceptance: "I will pay you \$100 for that horse." "All right, I will take the horse at that price," or "It is a bargain." The acceptance might also be made by a nod of the head or a sign. These would not be acceptances: "I will pay you \$100 for the horse to-morrow"; "I will pay you \$95"; or even "I will pay you \$105 for the horse"; or "I will take the horse at the sum named, but you must take your pay in goods from my store." These replies constitute counter-propositions. After such a proposition has been made, the parties cannot then accept the first proposition. A counter-proposition is a refusal of a proposition and the substitution of a new one.

The acceptance to be binding must not change the offer in any particular. It must be absolute; no conditions may be added. A conditional acceptance is no acceptance. It is equivalent to saying, "I am not satisfied with your proposition, but I will take it and make certain changes in it and submit it to you as an offer of my own for your acceptance." The original offer hereby loses its vitality, being, so to speak, passed by in the course of the negotiation so as to be no longer pending between the parties, and it becomes an open offer again only when renewed by the party who first made it. If the proposition is made to a particular person, it cannot be accepted by another. A man has a right to select those with whom he will contract. The acceptance may be implied from the acts of the parties, no set form being required. The law imputes to a person an intention corresponding to the reasonable and honest meaning of his acts as well as his words. These two elements (offer and acceptance) may be given orally, in writing, or one may be spoken and the other put in writing, and the result will be a contractual relationship.

Exception. The Statute of Frauds specifies that certain contracts must be in writing and signed. (See Chapter VII.)

4. *Time.* Time is an element of agreement in the relationship of offer and acceptance. Where the parties are together, nothing being said as to time of acceptance, it is understood to be immediate, and if the acceptance does not promptly follow the proposition, no agreement, or contract, will result.

When the parties are separated by some distance and the mails are resorted to, some time must be allowed; as in the following illustrations: A, of Chicago, writes B, of New Orleans, that he will sell him 500 barrels superfine flour at \$7.50 per barrel, mailing the letter September 1st. Flour advances in price and A concludes to withdraw his offer, so he writes and mails B a withdrawal of the proposition on September 2d. B receives A's first letter on September 3d and immediately mails his acceptance. The contract is complete and binding because B had no way of knowing that a letter of withdrawal had been mailed, and therefore was guided by the letter already at hand.

A letter withdrawing a proposition is not operative until delivered. A letter of acceptance is binding as soon as it is mailed. The same rule would hold true in regard to telegraphic communications. The acceptor must be guided by the proposition as to the means of communication to be adopted in each case. If the proposition is in form of a letter and says, "Answer by mail," or is silent on the point, a letter in answer is sufficient. If a telegraphic offer is received, an answer of like kind should be given. If directions are given in the proposition, they must be complied with. Any other method is simply a counterproposition and may be rejected by the one making the proposition. An acceptance forwarded by some other means than that contained or intimated in the proposition, is not binding until a proper delivery has been made. Such an acceptance is at the risk of the sender. The weight of authority is that it is optional as to whether the proposer need recognize such an acceptance.

54. Options. In the course of forming a contract, the proposer may give the other party a certain time to consider the matter. This is giving an option or refusal. If the one to whom the option is given pays something of value to the proposer, it is binding, and the proposer has no right to withdraw his proposition, which may be accepted at any time before the expiration of the stated interval. If, however, no consideration is given, the proposition may be withdrawn at any time. The weight of opinion seems, however, to require a notice of withdrawal to be effective. This notice need not be formal or direct.

55. Apparent Consent. Apparent consent to a contract may arise from several causes, the main ones of which are, mistake, misrepresentation, fraud, undue influence, duress.

1. *Mistake.* It is a well-settled principle of law that a man is bound by all his agreements that are entered into with full understanding, but if the agreement entered into is the result of a mutual mistake, it is voidable. Where each of the parties knows with whom he is dealing, where both mean the same thing and have formed correct conclusions as to the subject matter,

there can be no mistake. A mistake in reference to the nature of the transaction is rarely met. There may be a mistake as to the person, but most mistakes relate to the subject matter. Mistake of subject matter may arise as to its existence, its identity, its essential nature or qualities, its quantity, or its price. Mistake of person exists where A, of Chicago, supposes he is contracting with B in San Francisco, whereas in fact it is not B but B junior, who has succeeded to his father's business. Such mistakes may also arise where there is an undisclosed principal.

(a) *Effect.* Where there is any effect from this, the result is to render the contract voidable. If executory, the contract may be repudiated. If executed in whole or in part, what has been paid may be recovered. In equity, suit for specific performance may be resisted, or suit may be brought to declare the contract void. If the mistake is merely in drawing, the contract may be re-formed. The relief must be sought within a reasonable time after knowledge of the mistake.

2. *Misrepresentation.* Misrepresentation is very closely related to fraud. Generally the former is an innocent misstatement, or the non-disclosure of a fact which should be disclosed, while the latter consists in making a false statement knowingly, or making a statement in reckless disregard of its truth or falsity with the intention that the person to whom it is made shall act upon it. Mere expressions of opinion or commendatory statements are not misrepresentations.

(a) *Effect.* The contract is voidable. Mere misrepresentation has no effect except in contracts said to be of the "highest faith," in which, from their nature and peculiar circumstances, one party must rely on the other for his knowledge of the facts and the other is held to the utmost good faith. Such contracts include those between persons occupying confidential relations, as guardian and ward, trustee and beneficiary, principal and agent, attorney and client; contracts of life, fire, and marine insurance; and to a certain extent contracts for sale of land.

3. *Fraud.* Fraud may be defined as "every kind of artifice knowingly employed by one person for the purpose of deceiving another to his injury." In order that fraud may exist, there must be a false representation of a material fact, knowingly or recklessly made with the intention that the other party shall act upon it, who, in fact, does rely upon it to his injury. Fraud makes a contract voidable.

(a) *Classes of Fraud.* (1) To defraud each other. (2) To defraud third persons.

There is little difficulty in understanding the conditions in the first. In the second, however, we find some of the most difficult questions for settlement. Many examples of this kind of fraud are found in the case of failures. It will frequently be found that the one failing in business has transferred a considerable amount of property to some friend, and, as a result of this, creditors may not be able to obtain satisfaction for their claims. Such transfers are fraudulent and therefore voidable. Such transfers, so far as the creditors are concerned, may be set aside and sufficient property received to satisfy the creditors' demands. If, however, the failing party is able to show that at the time he sold or gave away the property he had a sufficient amount to pay all debts and claims then existing, the transfer cannot be set aside. If the transfer is to a creditor in satisfaction of a debt, it is valid, as a debtor may show preference in the payment of debts. Bankruptcy laws, however, generally require ratable payment of claims. (See page 76.)

(b) *Effect of Fraud.* The defrauded party may keep the goods and claim damages, or he may rescind the contract and demand the return of anything delivered. He is not obliged to return the goods, but if he wishes not to be bound he must not receive any benefit under the contract or he will be held to have affirmed it. He must also rescind and notify within a reasonable time after knowledge of the fraud. Aside from the contract, the defrauded party may have an action for the deceit, sue to recover what he has parted with, or resist an action at law on

the contract. These are law remedies. In equity he may demand the cancellation of an instrument or its re-formation.

4. *Undue Influence*. It sometimes happens that the relationship of the parties to a contract is such that undue influence may cause one of the parties to enter into an injurious contract. Undue influence is said to exist where a party to a contract has not acted of his own free agency, but where action in the matter has been controlled by the will of another. A good illustration is a contract between a guardian and his ward. Although the ward may be of age, yet the contract must be formed with the utmost good faith or it will be voidable.

5. *Duress*. If force is used to induce a party to enter into a contract, it is voidable. This force may consist in a threat to do bodily injury, or an unlawful arrest and imprisonment, and is commonly called duress. Such contract wherein duress is employed is voidable. As soon as a party is free from the force or threat, he must disaffirm the contract or it will be binding. The detention or threatened destruction of a person's goods may constitute duress.

56. RECAPITULATION

The minds of the contracting parties must meet.

There must be a distinct common intention.

Agreement may be either express or implied.

Agreement consists of offer and acceptance.

Offer may take the form of a proposition or of a question.

Acceptance is an assent or an affirmative answer.

The offer may be withdrawn at any time before there is an acceptance.

Acceptance made in apt time binds both parties.

A secret, unexpressed intention to accept will bind neither party.

Acceptance must be absolute. A conditional acceptance is no acceptance.

Acceptance in terms varying from an offer, or making a counter-proposition, is a rejection of the offer.

There can be no binding contract where there is no real consent.

Contracts tainted with fraud are voidable.

57. QUESTIONS

Define agreement. Distinguish between express and implied agreement. Define offer and acceptance. Illustrate.

What is the effect of an acceptance that varies the original offer? When must an offer be accepted? May an offer made to A be accepted by B? Define and illustrate Mistake and Misrepresentation, Fraud, Undue Influence, Duress. State the effect of each of these where they enter into a contract.

58. DECISIONS BY THE COURTS

1. In *I v. V*, 46 N. Y. 467, it was decided that an acceptance acted upon but not communicated to the other party does not make a binding contract.

2. In *A v. B*, a farmer saved his neighbor's stock of wheat from fire, then sued for his services. Held that the offer had not been accepted.

3. In *C v. D*, a horse was offered for sale. Defendant offered to buy if horse was warranted "quiet in harness." Plaintiff replied warranting "sound and quiet in double harness." Held not an acceptance.

4. In *W v. C*, 46 N. Y. 467, C wrote W, "Upon agreeing to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." W bought lumber at once and prepared to begin work. The next day the offer was withdrawn. Held no acceptance.

5. In *H v. E*, 4 Ill. 255, E offered to buy flour of H, sending offer by his (E's) carrier, directing answer to be returned by same carrier. H instead sent answer by mail to place to which the carrier did not go. He believed his answer would reach E sooner. Held not an acceptance.

6. In *W v. F*, F said to W that he would give 100 pounds sterling to the one who would marry his daughter with his consent. W married the daughter but failed to recover the money, as the court held that F should not be held on promises of such a general nature, that he was not "bound by general words spoken to excite a suitor."

7. In *T v. L*, the captain of a ship threw up his command while en route, but helped work the vessel home, claiming pay for the service. Held that he was not entitled to recover, as the owner had not accepted the offer of his service.

8. In *F v. T*, Ill. Apr. 153, T offers certain property to F for \$1,000. F says, "I will give you \$950," which is refused, and he thereupon says, "I will accept the first offer." Held that T is not bound by this acceptance, as the counter-offer was a rejection of the original offer. A proposal to accept an offer on its being varied from the original proposal and substituting a counter-proposal is held to be a rejection of the first offer.

9. In *B v. T*, an offer was made by mail requesting acceptance by cable. The acceptance was made properly, but after the acceptance had been sent and before received the proposer withdrew the offer. Held the withdrawal was not effective, as the contract began from the sending of the cable.

10. In *A v. L*, an offer was made by letter to sell a certain amount of wool. The letter was misdirected and was five days delayed in delivery. The receiver accepted the offer at once. In the meantime the proposer, not receiving a reply at the expected time, sold the wool elsewhere. Held that a contract resulted from this acceptance.

11. In *D v. H*, when an individual makes an offer by mail either stipulating for, or, from the nature of the business, having the right to expect an answer by return mail, the offer can only endure for a limited time, and the making of it is accomplished by an implied stipulation that the answer shall be sent by return mail. If that implied stipulation is not complied with, the person making the offer is released from it. In *M v. H*, 90 Ill. 525, the contract is complete only when the acceptance has been deposited in the mail within the time required by the law.

CHAPTER IX. ✓

THE OPERATION OF THE CONTRACT

59. INTRODUCTION

60. ASSIGNMENT

1. By Agreement of Parties
2. By Operation of Law

61. RIGHT ACQUIRED

62. WHAT CANNOT BE ASSIGNED

63. LIABILITY OF ASSIGNOR

64. RECAPITULATION

65. QUESTIONS

66. DECISIONS BY THE COURTS

59. Introduction. While we have found that there must be at least two parties to a contract and that those parties are the only ones affected by the contractual relationship, yet we shall find also that the rights and even the liabilities of others may intervene. He who interferes with the operation of a contract, thereby causing one of the original parties to suffer loss or detriment, is liable in damages. In this chapter we have to deal largely with the conditions whereby one or more of the parties to a contract is changed for another who takes his place.

60. Assignment. Here one's rights under a contract are transferred to another, the new party assuming the place of the one going out. The one assigning his rights is called the assignor, and he to whom they are assigned, the assignee. Assignment of a contract is brought about in one of two ways: first, by agreement of parties; second, by operation of law.

1. *By Agreement of Parties.* Since the parties formed the contract by agreement, it must necessarily follow that they may

agree to change its terms. If A has agreed to build a house for B for \$1,000, it may be agreed that C shall be substituted in the place of A. B is now obliged to pay the money to C, the latter agreeing to erect the house. It is now generally held that it is not necessary to have the consent of B to enable A to transfer his interest in the contract to C. Of course, however, A cannot escape liability; but the principal thing to B is the building of the house according to agreement, and if C complies with the terms of the contract he is entitled to the payment of the agreed sum.

But, while a right is assignable, yet a liability is not assignable. It is not necessary to secure the permission of the debtor to the transfer of a debt.

A, for instance, owes B \$100. A cannot transfer his liability to B over to C, but B may transfer his claim against A to C.

2. *By Operation of Law.* By operation of law, rights and even liabilities may be transferred to another. At common law the husband acquired his wife's property and also became liable for her debts contracted prior to marriage. Death passes title of personal property to the administrator or executor of a deceased person. Contracts that depend upon personal services terminate upon the death of the party obligated. Upon entry of a decree of bankruptcy, title passes to the receiver or trustee.

61. Right Acquired. Under an assignment, the assignee acquires only the right possessed by the assignor. The assignment, so far as assignor and assignee are concerned, begins as soon as the assignment is made, but, in order to fully protect the rights of the assignee, notice must be given to the debtor. The debtor has a right to know to whom he is liable, as he naturally believes he owes the original creditor until he is notified to the contrary. As soon as he receives this notice he must not pay the first creditor, as he would still be liable to the assignee. The notice need not be formal; it is sufficient if the debtor has knowledge of the transfer. Anything that puts him on inquiry is all that is required. For instance, A owes B \$1,000 for building a house. He pays \$300 on the agreement. The payment is not acknowledged on the agreement, but he has good evidence of

payment. On September 1st B assigns the claim to C for \$1,000. C, however, acquires a right to enforce collection of but \$700. He acquires only B's interest. On September 5th A pays B \$200. There having been no notice given to A, C can now collect but \$500 from A. However, C would have a claim against B for partial failure of subject matter.

62. What Cannot Be Assigned. A contract, the subject matter of which is personal services, cannot be assigned. A agreed to paint a portrait of B. He cannot assign this contract to C.

63. Liability of Assignor. The assignor of a contract or right impliedly guarantees that the claim is good; that he has a good title; that the debtor is competent to contract; and that he has the right to assign.

64. RECAPITULATION

A third person who interferes with the operation of a contract is liable in damages to the party injured.

A contract is assigned when the right of one of the parties to it has been transferred to one who has hitherto been a stranger to the agreement.

Assignment may be made (1) by act of the parties, or (2) by operation of law.

The assignee in general takes these rights subject to all equities and defenses that may have been set up between the original parties.

65. QUESTIONS

Define assignment. Distinguish between assignment by agreement and assignment by operation of law. What are the rights of the assignee? What cannot be assigned? What is the liability or undertaking of the assignor?

66. DECISIONS BY THE COURTS

1. In *B Ice Co. v. P*, 123 Mass. 28, the plaintiff had furnished ice to the defendant, but because of dissatisfaction the defendant had terminated the contract and had entered into an agreement with C Ice Co. to supply him. The latter company sold out to the former company, which again resumed the delivery of ice to the defendant without giving him notice. It was held that a party has a right to select and determine with whom he will contract and cannot have another person thrust upon him without

his consent, and that as there was no privity of contract established between the plaintiff and defendant, without such privity, the possession and use of the property will not support an implied contract to pay for it.

2. In *C v. R*, 15 Mass. 387, R was sued by the assignee of a note held not negotiable on account of a contingency upon which payment was made to depend. It was held that the assignee of such a common law chose in action could not maintain an action upon it in his own name.

3. In *V v. H Ins. Co.*, 14 Conn. 141, the plaintiff brought suit by attachment against one M, attaching a debt claimed to be due to him from the defendant upon a policy of insurance. The defendant company resisted payment on the ground of an assignment of the policy to X. It was found that no notice of the assignment had been given to the defendant until long after the attachment. The defense was held not to prevail, and the rule laid down that in order to perfect an assignment of a chose in action, as against bona fide creditors and purchasers without notice, notice of such assignment must be given to the debtor within a reasonable time; and, unless such notice is given, creditors may attach and acquire a valid lien, and others may purchase the debt and gain a title superior to that of the first assignee.

4. In *A v. B*, 127 U. S. 379, the plaintiff was the assignee of a contract for the delivery of ore in 100-ton lots for smelting. The price to be paid for the ore was to be ascertained by an assay to be made after delivery. From delivery until the price was thus ascertained and paid the defendant had no security for payment except in the character and solvency of those who received the ore. The court held that such a contract is not assignable, quoting the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract," and distinguishing the contract from a simple agreement to pay money, or to deliver goods, which is assignable.



SIR WILLIAM BLACKSTONE

SIR WILLIAM BLACKSTONE (1723-1780)

An English jurist, educated at Pembroke College, Oxford. Having made a choice of the law, he was entered in the Middle Temple in 1741, and called to the bar in 1746. He is the author of *Blackstone's Commentaries*, an exposition of the common law. This treatise is written as four books (published in two volumes), dealing respectively with rights of persons and things, and public and private wrongs. He was by no means a great jurist and his writings are not accepted by lawyers as of great legal weight, but they have rendered much the same service to educated society of England that the Institutes did to Rome and the students of the civil law.

CHAPTER X.

THE INTERPRETATION OF THE CONTRACT

- 67. INTRODUCTION
- 68. PROOF OF CONTRACT
 - 1. Oral
 - 2. Written
 - 3. Sealed
- 69. USAGE OF TRADE
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- 70. THE CONSTRUCTION OF THE CONTRACT—
Intention
- 71. SECONDARY RULES
 - 1. Time
 - 2. Penalty and Liquidated Damages
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- 72. RECAPITULATION
- 73. QUESTIONS
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67. **Introduction.** Under previous sections we discussed, first, the manner of forming a contract and the elements that are essential; and, second, the operation of the contract, those whom it affected, and those who might acquire rights or assume liabilities under it. We are now to discuss the rules that are followed in explaining the meaning of the contract—how we prove the contract and determine what it means. This section will be dealt with under two heads: (1) proof of contract; and (2) construction of contract.

68. **Proof of Contract.** 1. *Oral.* When the contract is formed orally, the terms of the contract can only be established

by means of witnesses, parties who have knowledge of the agreement.

2. *Written.* The existence of a written contract is established by producing the writing. It is the evidence of the intention of the parties and must be produced unless lost or destroyed, in which case its terms must be established by parol evidence. If the contract is partly written and partly printed, as is usual in business papers, and there is an inconsistency, the written parts prevail.

3. *Sealed.* The existence of a sealed instrument also is established by the production of the writing. A parol contract depends upon a consideration for its validity, while a sealed contract depends upon its form. In the former the consideration must be proved; in the latter it is presumed. The former is the evidence of the contract, while the latter is the contract.

While parol evidence is not competent to "change, vary, or contradict" the terms of a written contract, it is always permissible to deny the force and validity of such a contract. It may be shown that the instrument was executed through mistake, fraud, duress, without consideration, or by an incompetent party.

Oral evidence is also admissible where the submitted agreement is not complete. This must not vary the writing, but must supplement it. It is also permissible and sometimes necessary to resort to parol evidence to establish either the identity of the parties or the subject matter.

69. *Usage of Trade.* Frequently it is necessary to ascertain the usage or custom of trade in order to determine the true meaning of a contract. In commerce words frequently have a technical meaning aside from their ordinary signification. This technical meaning may be established by parol evidence. In a celebrated English case, in the transfer of a large number of rabbits, it was contended that the word "thousand" meant in that trade 100 dozen, or 1,200. It was so established by parol evidence. So, likewise, has it been shown that "thousand" meant seven hundred, a day but 10 hours, and so on.

1. *Essentials to Usage of Trade.* Not every technical term or distinction may, however, be explained by introducing evidence of usage in trade. A usage of trade must be established, it must be uniform and certain, it must be general, it must be continued, it must be known, it must have been adopted, it must not be in opposition to the contract, it must not oppose a statute, and finally it must not conflict with public policy. Custom can make law but can not repeal law.

70. **The Construction of the Contract.** *Intention.* The fundamental rule applied to the interpretation and construction of a contract, is to get at the intention of the parties who formed it. The courts will grant the use of every means to effect this end. Words are to be understood in their ordinary meaning, except, as was said, in cases of special trade usage. A person is presumed to have used the language necessary to express his intentions. The instrument as a whole must be looked at, and, if possible, be so construed as to give it validity.

71. **Secondary Rules.** It is not necessary for the written instrument to consist of but one document; it may be made up of a series of correspondence. If so, and if these refer to each other, they must all be examined and construed together to determine the precise nature of the agreement.

1. *Time.* Time also is an essential element in the construction of a contract. If no specified time is named, it is understood to be present time, and the agreement is to be carried out within a reasonable time. A contract may, by naming a certain date, make it obligatory upon one of the parties to perform promptly on or before the date named, under penalty of releasing the other party and also of making himself liable to the other party in damages. If, however, it can be shown that the date mentioned is considered as an approximate one, equity will come to the relief of the party obligated and allow a reasonable time for fulfillment of the agreement. The parties, however, may make the date an essential.

2. *Penalty and Liquidated Damages.* In order to secure prompt performance of a contract parties, quite frequently insert

an additional clause stating, if the contract be not executed in a certain manner and by a certain time, the delinquent shall pay to the other a certain sum of money or suffer some other damage. Such agreements are frequently made, and the courts constantly attempt to lessen the liability if the agreements are unreasonable. Two reasons may be assigned for inserting these additional conditions: first, to fix in advance the damages that a non-performance might be deemed to produce, known as liquidated damages; second, to fix the amount of damages so high as to act as a punishment. In enforcing these agreements courts are not bound by the name applied to the damages. It is sometimes called a penalty and again liquidated damages. If the subject matter is of a certain value and the damages may be computed, excessive damages will not be allowed. If, however, the contract is of such a nature that no certain value can be named, then the amount of damage is left as a matter of agreement with the parties.

A agrees to build a house for B for \$2,500, finishing it May 1st. A penalty clause is added which provides that if the house is not completed by that date, A is to pay B \$100 per day for each day after May 1st until completion. This is called a liquidated damage clause, the damage being stated. This is clearly unreasonable. The court will allow B to collect the actual damage only. If, however, the contract were of such a nature that the value of the subject matter could not be determined, then the sum agreed upon could be collected.

3. *Entire and Divisible Contracts.* Whether a contract may be divided into several contracts or be construed as a single contract, is sometimes of vital importance to one of the parties. If, in a series of deals entered into at the same time, the contract has for each item of subject matter a separate consideration, it is said to be divisible; while if one consideration was given for several subject matters it is deemed to be entire. A, for instance, agrees to sell B one horse for \$150, a wagon for \$75, and a set of harness for \$75. This agreement may be in writing and properly signed. Enumerated as stated, it would be divisible. If the agreement called for one horse, a wagon, and a set of harness

for \$300, the contract would be entire. If in the first case the horse was killed and therefore became impossible of delivery, A could still insist on B's taking the other articles, although he might not want either one of them without the horse. In the second case the contract would be annulled.

72. RECAPITULATION

The existence of oral contracts is proved by the testimony of witnesses.

The existence of written contracts is proved by the introduction of the instruments themselves.

A written contract can be established by parol evidence only when the instrument is lost or destroyed.

A parol contract depends upon a consideration for its validity, while a sealed contract depends upon its form.

Parol evidence is not admissible to change, vary, or contradict the terms of a written contract.

Parol evidence is admissible to show mistake, fraud, duress, the absence of consideration, or the incompetency of a party to contract, or to establish the identity of the parties or of the subject matter.

The special meaning of words arising from usage or custom of trade may be shown by parol evidence.

This usage of trade must be established, uniform, certain, general, reasonable, not in opposition to the contract or to a statute, and not in conflict with public policy.

The first rule of construction is to ascertain the intention of the parties.

Words are taken in their ordinary meaning, and the instrument is to be construed as a whole.

The existence of a contract may be established from several different papers, such as an interchange of letters.

Time, if so made by the agreement of the parties, may become an essential element of the contract.

Performance is sometimes sought to be secured by an agreement for liquidated damages or by a penalty to be paid upon failure.

A contract in general is divisible when the consideration is divisible.

73. QUESTIONS

How do you prove an oral contract? A written contract? May parol evidence be introduced to change, vary, or contradict the terms of a written contract? What exception is there to this general rule?

What are the essentials to a usage in trade? What is the fundamental rule in the construction of a contract? Mention some secondary rules of construction.

What is meant by liquidated damages? Distinguish between a penalty and liquidated damages. Illustrate. Distinguish between an entire and a divisible contract. Illustrate.

74. DECISIONS BY THE COURTS

1. In *S v. W*, 1 *Murphy*, 426, the contract upon which suit was brought had been reduced to writing, but upon trial the plaintiff sought to introduce oral testimony of a warranty not contained in the writing. It was said that it is contrary to the common law to add anything to or contradict a written agreement by parol evidence. To admit it for the purpose of proving that the written instrument did not contain the real agreement, would be the same as receiving it for every purpose. A written contract may be explained but not altered by parol testimony. The exception to the general rule may be comprised under the heads of frauds, surprise, mistake, cases of resulting trust, to rebut an equity, and to explain latent ambiguities.

2. In *C v. K*, 19 *Wend.* 386 (N. Y.), the defendant under a contract in writing was to excavate a lot and make necessary embankments for \$180. There was no stipulation in the contract providing for the ownership of the surplus land. The defendant sought to prove a custom of the city of Albany which had existed for a great number of years and was well known and understood, that the excavator was entitled to such sand. It was held that evidence of such custom was admissible. "It is fair to conclude the particular parties contracted with reference to it."

3. In *B Co. v. C Co.*, 52 *Fed.* 700, the plaintiff contracted to furnish in the course of the year a large supply of printing and lithographs. A portion was not delivered until a few days after the year had elapsed, and the defendant refused payment. It was said: It is a general principle governing the construction of contracts that stipulate as to the time of their performance, that time is not necessarily of their essence; that unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement; and that where the intention of the parties does not so appear, performance shortly after the limit of time set by either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counter-claim for the damages he has sustained from the breach of the stipulation.

4. For entire and divisible contract see *S v. H*, 2 *Alt.* 232, 17 *R. I.* 109, Page 35.

CHAPTER XI.

THE DISCHARGE OF THE CONTRACT

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75. Introduction. Before discussing the discharge of a contract it will be well to recall the ways by which the contractual relationship is brought about. The fundamental principle of allowing everything except what is forbidden is found here to be an underlying principle. What parties have agreed to do they may also agree not to do, but each new agreement must be based on a sufficient consideration. When suit is brought by a claimant the other party must defend himself. All the right is not necessarily on the side of the party bringing suit. The reason why a party refuses to perform his part of an agreement may be because the other party has not done as he agreed to do.

76. Ways of Discharge. 1. *Agreement.* An agreement may relate to everything that is legal. If a contract is executory in its nature it may be mutually dissolved, each release being the consideration upon which the other relies. If the contract is executed in part or wholly on one side, no mere release will be sufficient; it will not be based on a consideration. A, for instance, agrees to deliver to B 100 bushels of wheat, if B will agree to work for A 50 days. The wheat is partly or wholly delivered. It is then agreed that the contractual relationship shall cease. Still, notwithstanding this agreement, B may sue for the value of the wheat delivered.

2. *New Agreement.* By the common consent of the parties a new agreement, or one materially changed in part, may be substituted for the old one, the new rights and liabilities being sufficient consideration for those released. As to whether an oral agreement shall be allowed to be substituted for an old one, depends upon statutory requirements. Generally, any form of contract may be changed by an oral agreement, particularly where the agreed changes have first been acted upon by the parties.

3. *Implication.* This new agreement may be by implication. Wherever the parties carry out an agreement in ways that are inconsistent with the former agreement, the change will be understood to have resulted from a new agreement. While these new agreements more frequently relate to the subject matter, they may equally well relate to the consideration or the parties—in the first by increasing or decreasing the consideration, and in the last by a substitution of some third party.

A, for example, owes B \$50 and B owes C \$50. The parties agree that A is to pay C the amount. B is cleared from indebtedness and C's claim is against A. A substitution similar to the above may arise from implication, as where A and B agree that A shall be liable to C. The latter has a right to object, but if he accepts part or whole payment from A, treating it as A's debt, it will be implied that he agrees to the substitution.

4. *Conditions.* The relationship between the parties may be based on a condition, the happening or non-happening of which is to have a certain effect on the contract. If this condition to a contract is not fulfilled the party aggrieved may, as a rule, treat the contract as discharged. If goods received are not up to conditions stated, they may be returned within a reasonable time. The conditions that enter into contracts are well illustrated in a bond. Here one party obligates himself that in the non-happening of a certain event he is to assume certain liability; at the happening of the event his bond is terminated.

5. *Performance.* When the terms of the contract have been fulfilled the parties are released, the contractual relationship

between them having then been completed—each has received that for which he contracted. Each party, however, must have lived up to the agreement in order to have a complete performance. One party may be able to show performance while the other may not. In carrying out the provisions of a contract it is generally sufficient if the contract is substantially performed. When you have done what you agreed to do you may plead performance and escape liability from damages.

If the contract has been executed on one side only, it is not discharged by the one entitled to claim the benefit saying that he waives his right. A release must have a consideration unless executed under seal. A agrees to work for B one month in payment for 100 bushels of wheat. At the end of the time he receives 75 bushels and then says he will waive his claim for the balance. This last agreement is not binding, as there is no consideration to support it.

77. Tender. The right to insist that A shall live up to his agreement depends upon whether B has performed his part. You may sue in enforcement of a right only when your part is performed. A agrees to sell and deliver a certain horse to B in consideration of B's paying \$100. This is a contract. A now has acquired a right to the money, B has acquired a right to the horse. Neither has a right, however, to sue the other or insist on the other's carrying out the agreement until he has himself performed what he agreed to do. If A delivers the horse to B, he may then sue for the money, or B may offer the money and demand the horse.

1. *Definition.* Tender is the offering or attempting to do what you agreed to do. It is very important to know that in order to perfect a right you must first make a tender; your obligation may be to do something or to pay something. When in some contested case you may employ counsel, you may at once be asked the question, "Have you made a tender?" "No." Then your right may be lost.

2. *Requisites:* In tendering payment the following points must be observed:

First. The tender must be in the exact amount due.

Second. It must be unconditional.

Third. It must be in the legal currency of the country.

Fourth. It must be actually offered, so as to afford an opportunity to accept or reject.

Fifth. It must be kept alive; that is, you must be ready to pay it at any time subsequent to the first offering.

3. *Obligation to Pay.* In all cases it is the duty of the debtor to seek the creditor at the proper place and offer the exact sum of money on the date due. You have then made a good tender. If the money is of the kind sanctioned by law you have made a legal tender. The tender must be without conditions. You have not even the right to demand a receipt as a condition precedent to your paying. If, however, you are paying a note or a draft, you have a right to demand the cancelled instrument as a receipt. You must offer the money to the creditor. It is not enough to say, "I want to pay my account." The money must be produced and offered.

(a) *Legal Tender.* The following are the amounts and kinds of money that have legal tender properties:

(1) Gold coins, any amount.

(2) Silver dollars, any amount; fractional silver, in amount not to exceed ten dollars.

(3) Copper and nickel coins, not to exceed twenty-five cents.

(4) Greenbacks, any amount; not legal tender, however, for duties or for interest on public debt.

(5) Treasury notes, any amount.

National Bank currency, it will be noted, is excluded. If a tender of this kind of money, or of a larger amount of any other currency that the creditor is not obliged to accept, is accepted, he cannot afterward object to the kind or amount of the currency thus offered.

As soon as a legal tender is made it stops the accumulation of interest on a claim, and if the tender is kept good by the debtor's

being able at all times thereafter to pay the debt, it is a good defense. If suit is brought, the one bringing suit must pay the costs. After a claim is due, a good and legal tender may be made by adding the legal interest for the time the claim is past due.

4. *Obligation to Do Something.* The tender can be made only with strict reference to the due date. If it is made on the proper date and is refused, the debtor is released from his obligation. If A agrees to sell B a horse and deliver it on May 1st in satisfaction of an old claim, he must tender it on that date. If, when the horse is tendered to B, he refuses to receive it, A is released from his agreement. The title to the horse passes to B and A may resist suit for the enforcement of the agreement. A must take proper care of the horse and turn it over when demanded, but must be reimbursed for expenses. If A does not make delivery on the proper date, he loses the right to cancel the debt by making the delivery of the article, and the fulfillment of the contract rests with B. It is optional with him. If the property in question has advanced in value, he will doubtless demand it, while if it has decreased he will call for the money on the contract basis.

5. *By Whom and to Whom.* While the obligation is from debtor to creditor, the tender may be legal when the duty is performed by another generally known as agent of the debtor. Likewise, a tender to an agent of the creditor who has authority is legal.

78. Discharge by Payment. Tender is the offer made by the debtor to the creditor according to the terms of the agreement, and the acceptance of the tender will constitute payment.

1. *Definition.* Payment is generally the performance of a contract by giving a sum of money, and may be set up as a defense. If payment is not made as agreed, nominal damages, interest for additional time, will be allowed.

2. *Duty of Debtor.* It is the duty of the debtor to seek the creditor and make payment according to the agreement. If there are any terms or conditions, he must comply with them or he will

suffer the loss, if any. If the debtor makes use of an agent, the mail, for instance, he takes the accompanying risk. If the creditor gives any special directions as to the way of sending the money, the debtor may comply and the risk is with the creditor.

3. *Negotiable Instrument as Payment.* Whether the giving of a note or a draft constitutes payment is not wholly a settled question. If the instrument is given at the time the debt is contracted, it is generally considered a means of securing payment, and is not payment itself. In the first case, if the negotiable papers are not paid when due, suit will have to be brought on the note or draft in question, while in the second case suit can be brought on the original contract.

4. *Note of Third Person.* If the note of a third person is given, it is generally held to be a satisfaction of the original claim, whether given at the time of making the contract or at a later date.

5. *Forged Notes or Counterfeit Money.* Payment made in counterfeit money or forged paper, whether innocently or not, is not a legal payment. It is the duty, however, of the one receiving such payment to object within a reasonable time. If the notification is given promptly the debtor may be able to trace the source from whence he received the counterfeit money. Therefore, if the notice is not given within a reasonable time, it cannot be returned, and the creditor will not be allowed to collect his claims.

6. *Standing of Receipts.* When a receipt is given it is *prima facie* evidence that payment has been made. Yet one important rule of evidence does not apply. It may be shown that the receipt was given in mistake or that the term "in full of account" should read "on account." Parol evidence is always admitted to explain a receipt.

7. *Application of Payments.* While it is the duty of the debtor to pay his obligations, he has a right to insist, where he owes several separate debts, that the payment shall apply to some particular one. The creditor has a right to refuse to receive payment under such terms, but if he accepts he must apply it as

directed. Where the payment made is equal to one of the debts, it is presumed to be a payment of that account. Where no directions are given, the creditor may apply to any debt that is due. He may even apply payment to an account that is unenforceable or outlawed owing to length of time. After he has made the application he can not change.

79. Discharge by Impossibility of Performance. This may arise from the fact that at the time of making the contract it was impossible to perform, or such a condition may arise after the contract is formed. In the first case there is no very difficult legal problem; if known to both parties, there is no real consideration to support the contract, but, where the impossibility develops subsequent to the making of the contract, it is more difficult to adjudicate. Three questions are suggested: Was the impossibility unknown to both parties? Was it unknown to the promisor? Was it unknown to the promisee?

1. *Performance of Promises Required.* The general rule is that a person must perform all his agreements since they are of his own making. He can have no excuse to offer. A distinction must be made between an act that is impossible in itself and an act that is impossible for a particular person to perform. If a person wishes to provide against, and protect himself from, disastrous consequences in case of impossibility, he must insist on such a condition at the time he makes the contract. Upon agreeing to sell and deliver goods to B, A cannot thereafter plead that it would be dangerous to deliver the goods on account of local disturbances and therefore he ought to be excused. A agreed to furnish horses according to a contract which contained a clause allowing the buyer to change the specifications. Upon such change being made, A was not allowed to plead that he could not find such horses. If the obligation to perform is imposed by law, it is always reasonable, and if performance becomes impossible the promisor is excused. The common law excuses a common carrier from liability in case of an act of God. If the obligation is undertaken by the promisor with full knowledge that

it may result in impossibility of performance, he is nevertheless liable on the contract. If a common carrier specially contracts against all loss, it is immaterial as to the cause of loss. If the promisor conditions his agreement to the possibility, the promisee takes the risk. If the promisor makes an unconditional promise, he must stand the loss in case of impossibility to perform.

Exceptions. A person is excused from performing a contract, first, where the act is rendered impossible by operation of law; second, where it is evident that the parties intended the contract to apply to present conditions and not to changed ones. If the contract is to do one of two things and one becomes impossible, the other must be performed. This is the case where at the time of making the contract one was possible and the other impossible, also where both at the time of making the contract were possible and one becomes impossible.

80. Discharge by Operation of Law. The relationship of the parties since the contractual tie was formed may become such that the law declares a release is brought about. This will be discussed under five heads: alteration, merger, loss, bankruptcy, and death.

1. *Alteration.* If the contract is materially changed or altered as to its legal effect, it is optional with the other party as to whether it shall stand or be declared void. The alteration must be made intentionally and by the party interested, not by a stranger. It must be made without the consent of the other party. It must be made after the delivery of the instrument and before its promises have been carried out. It must be natural and it must be made with intention to defraud.

2. *Merger.* The right to enforce a claim may merge into a higher claim, thereby cancelling the first or lower security. A suit may be maintained on a contract, and, if a judgment is secured, the contract debt is merged in the judgment debt.

3. *Loss.* The common law recognized no remedy in case a written agreement was lost. Equity, however, has provided a remedy, generally requiring an indemnity bond against loss.

4. *Bankruptcy.* Bankruptcy proceedings regularly instituted and completed, release one from further liability. By a provision of the Constitution of the United States Congress has

the power "to establish uniform laws on the subject of bankruptcies throughout the United States."

"A bankrupt law enables a person who is unable to pay all his debts to divide what property he has among his creditors proportionally and to be discharged from legal obligations to make further payment. The moral obligation to pay one's debts in full still exists. Congress has absolute power in the matter of bankruptcy, but it has not exercised this power continuously. The present bankrupt law was passed in 1898."

5. *Death.* Death releases a party from a contract if the relationship is personal in nature. If, however, the contract related to property rights it must be carried out by his personal representatives.

81. *Discharge by Breach.* When the party obligated refuses to perform his part of the contract or will not allow the other party to perform, there is said to be a breach of contract. The breach may be in whole or in part of the contract. This brings about a legal relationship whereby the injured party has a claim for damages. He has a right of action.

1. *Breach Before Performance.* In this stage the contract is executory—each party has a right to have the contractual rights continue and their execution fulfilled at the proper time. To constitute a breach the renunciation of the contract must be complete. Where A made a contract for service with B and was informed by the latter that he need not report for duty, it was held to be a breach of contract, and suit was maintained before the time for performance of the contract.

Where a party to a contract has made it impossible to perform by his own actions, the breach is complete. If the performance has been commenced and there is a renunciation by either party, or an act by one that makes performance impossible, the injured party has a right to payment for the part performed and to damages for the rest.

82. *Accord and Satisfaction.* When a party (to a contract that has been violated by one or both) discusses and agrees upon the amount of damages due from one to the other, there is said to be an accord. When the agreed sum is paid there is an accord

and satisfaction. Accord is no defense. Accord and satisfaction is a good defense against subsequent suit for damages for a breach of contract.

83. Set Off. It frequently happens that in a controversy as to damages caused by breach of contract, there are several claims to be considered. The placing of one set of claims against the other is known as set-off, a judgment for the balance being entered, which may be in favor of either party. Set-offs are favored in law, as they simplify matters by adjudicating several claims at the same time. These several claims must be mutual ones and all due at the time of suit.

84. Statute of Limitations. 1. *Lapse of Time Bars Action.* While a person's right of claim against another is not satisfied until paid or in some way cancelled, still the State directs that such rights of claims shall be prosecuted within a specified time. The State does not approve of slothfulness. If there were no limitations as to the time during which claims could be enforced, it might open the door to fraud. A dishonest creditor might attempt to enforce a claim when he felt assured that the debtor had destroyed or lost receipts, or that his witnesses were dead or removed from the state. The State acts on the presumption that if you have not enforced your demands within this specified time there must be some reason why they should not be enforced, or that after the specified time the debt is presumed to be paid. The states are not agreed as to the time within which suit may be brought. Generally the period of five years is established for open accounts and ten years for written contracts.

2. *When the Statute Begins to Run.* In a general way we say it begins to run the day that suit might be entered for the enforcement of the claim. A buys goods from B on 30 days credit. At the expiration of the credit named, B may bring action for the amount of the sale. He must bring his action within the time designated in his state or he has given the debtor a complete defense against its collection. There are a few exceptions

favorable to the plaintiff that when named are apparent: Minority, coverture, imprisonment, and insanity, provided the right of action had not commenced before the disability occurs, as in the case of imprisonment or absence from the state. The time begins to run at the expiration of such disability.

If a debtor removes from the jurisdiction of the court where the claim is recoverable, the statute ceases to run and will not commence until his return, which must not be in a secret manner.

3. *Removal of Bar.* The statute does not extinguish the claim but acts as a bar to suit for recovery. The defense of limitation must be set up by the defendant. When the statutory period has run, the claim may be brought to life in one of several ways: (1) The debtor may make a promise to pay—usually the law provides that this must be in writing. It is generally held that a mere acknowledgment of the debt is sufficient. (2) A part payment of the claim with an intention of paying the whole claim, will revive the balance of the claim. If a debtor owes his creditor two distinct claims, one barred and the other not barred, and he makes a payment to the creditor without naming the account on which he desires it credited, the creditor may apply on the barred claim, but it will not revive the balance. (3) The payment of interest on such a loan will revive the debt the same as a part payment.

When a barred claim has been revived by an acknowledgment, part payment, or payment of interest, the claim revives on that date and the statute again begins to run.

85. Damages. Whenever a party violates his obligation in a contract, he is guilty of a breach of contract, and the remedy is damages, the measure of which is determined by the application of certain rules, some of which are as follows:

The amount claimed must be comparable with the injury.

When the action is for a money debt, only interest may be added.

Damages “must be certain, both in their nature and in respect to the cause from which they proceed.”

For example, A buys from B seed corn warranted good. The seed is worthless and no crop is produced. A cannot claim as damages profits on the year's expected crop, but may collect the cost of the seed corn, the value of the labor expended, interest, less benefit that might result to the land from the labor.

86. RECAPITULATION

Discharge is any legal means whereby contractual relationship may be terminated.

Discharge of contractual relationship may be effected by agreement. A new agreement may be substituted and may be by implication.

One may treat a contract as terminated by failure of the other to act.

If the terms of a contract have been fulfilled, the contract terminates by performance.

Tender is an offer to do what one is obliged to do. Legal tender preserves certain rights.

If to pay money, the effect of tender is to stop interest on the claim and throw the costs on the creditor in case of suit. It does not cancel the obligation.

If to perform, the offer must be on the proper date, complying with all reasonable conditions; the debtor will then be released from his agreement. The obligation is canceled; the debtor continues to hold the property at the risk and expense of the creditor.

Payment operates as an extinguishment of a contract by an acceptance of a tender.

It is the duty of the debtor to seek the creditor and make tender and payment.

Negotiable instruments may be received as payment or as a means of securing payment.

Payment by forged note or by counterfeit money is no payment.

A receipt is accepted as *prima facie* evidence of the facts recited thereon.

When payment is made and there are several debts, the debtor may direct as to the application. In absence of instructions the creditor may make the application, even applying to an outlawed claim.

Impossibility of performance is generally a good defense, but it must be the act and not impossibility in the person.

To protect one's interests stipulations must be agreed to at time of making contract.

By operation of law one may be excused from performance.

Intentional and material alteration by an interested party releases the other party.

A merger is the changing of one security into a higher one. It releases the former agreement.

The common law does not, but equity does, provide against loss of instrument.

Bankruptcy proceedings regularly instituted release one from all contracts.

Breach of contract terminates an agreement and injured party has claim for damages.

Under the statute of limitations claims must be enforced or a legal attempt made to do so within a stated time.

The statute does not extinguish the claim, but makes it unenforceable. A new promise, part payment, or payment of interest will revive the claim.

Accord is the agreement on damages due from one to another.

Satisfaction is the extinguishment of the amount named by the accord.

A set-off is the carrying of a claim or claims by the defendant against the claim or claims of the plaintiff.

Damages is the compensation which the law will award for an injury done.

87. QUESTIONS

Enumerate the different ways in which a contract may be discharged by the act of the parties. Illustrate discharge by agreement; by new agreement.

Define tender. Enumerate the requisites of a valid tender. What is the effect of tender? What distinction is there between tendering money and tendering a chattel?

What is payment? Discuss payment by means of negotiable instruments; by means of counterfeit money.

What is the effect of a receipt? What is the rule in regard to the application of payments? When is a promisor relieved from performing his contract on account of impossibility, and when not? Enumerate the different ways in which a contract may be discharged by operation of law.

Define merger. Illustrate. How is a contract discharged by breach? Illustrate. What is an accord and satisfaction? A set-off? Is accord without satisfaction a good defense?

What is the statute of limitation? Discuss the theory. When does the statute begin to run? What is the effect upon a debt after the specified period has run? What exceptions are there to the operations of the statute? What will operate as a removal of the bar imposed by the statute?

88. DECISIONS BY THE COURTS

1. In *R v. T*, 12 Cush. 281 (Mass.), the defendant bought a horse with the right to return it within a specified time if it was not satisfactory. He returned it within the specified time, but the plaintiff refused to accept it and offered to show that the defendant had misused it so as to materially lessen its value. It was held that the defendant thus disabled himself to claim the benefit of the condition, that the condition was thereby discharged and that the sale became absolute.

2. In *H v. C Co.*, 157 Mass. 109, the plaintiffs after entering into a contract gave notice of insolvency, and for several months neither the plaintiffs nor their assignees did anything in regard to the contract. They then attempted to enforce the contract, and the defendant claimed the right to show such conduct to be an abandonment of the contract as would discharge the same. It was held that such evidence was admissible.

3. In *C v. C*, 116 Mass. 408, the plaintiff contracted to buy certain land, made a number of payments upon the same, and then failed to complete the purchase. The defendant agreed that if plaintiff would keep the premises furnished until he could make another sale he would repay with interest all she had paid upon the contract. This he later refused to do on the ground that there was no consideration for such promise. It was said the rescinding of a previous contract containing mutual stipulations is a release by each party to the other. The release by one is the consideration for the release by the other, and the mutual releases the consideration for the new promise, sufficient to give it full legal effect. The defendant was bound to account for the money paid to him.

4. In *C Co. v. G W*, 124 Ill. 623, it was said that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment unless it be expressly agreed to take the note as payment and run the risk of being paid, or unless the creditor parts with the note or is guilty of *laches* in not presenting it for payment in due time.

5. In *W v. S*, 6 Wall 80 (U. S.), a note had been signed by a surety and thereafter the date had been changed by the maker before delivery. The court instructed the jury "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the maker, Newson, Steele was discharged from all liability on the note." This instruction was held to be correct. It is the settled rule both in England and America that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability, and an alteration of the date has been uniformly held to be material.

6. In *V v. J*, 20 N. J. Law 340, certain creditors had an account against a debtor, who gave them a bond and mortgage securing the

account. In subsequent proceedings, in an assignment for the benefit of creditors, the question was raised whether or not the account was merged in the bond and mortgage. The rule was stated to be that the taking of a bond and mortgage, or other security of higher nature, extinguished a debt arising from mere matter of account. Yet this will depend on the intention of the parties. If the higher security is given as future evidence of the debt to be looked to for payment, then the lesser merges in the greater; but if the higher security is merely to be additional or collateral to the lesser, showing intention to keep the lesser open and to be looked to for payment, then the lesser is not extinguished by the greater.

7. In *M. & St. P. Ry. Co. v. A*, 91 U. S. 489, as a general rule the object of the law in awarding damages for civil injury and breach of contract is to put the plaintiff in the same position, so far as money can do it, as he would have been had there been no injury or breach; that is, to compensate him for the injury actually sustained. Also *R v. A*, 7 Mass. 254, *S v. S*, 2 Tex. 460.

8. In *M v. E*, 164 Mass. 457, where a contract for the use in Massachusetts of electrotyped plates owned by plaintiff in Leipsic, Saxony, is drawn up and signed in Massachusetts by defendant, and sent to plaintiff, who cabled acceptance to defendants in Massachusetts, the measure of damages for breach is governed by the laws of Massachusetts.

9. In *G v. K*, 22 Mich. 117, damages will not be denied because their nature is such that they cannot be accurately measured. If they cannot be measured by a fixed rule, all facts and circumstances tending to show what they are should be submitted to the jury.

10. In U. S. Fed. Case 10469, nominal damages will be given for the breach of a valid contract, although it does not appear that the plaintiff has sustained actual damages. Also *A v. R*, 65 Ala. 586.

11. In *E Co. v. S*, 61 Conn. 56, in action for breach of contract of employment, though the committee to which the case was referred found that the plaintiff benefited by defendant's breach of the contract, plaintiff is entitled to nominal damages.

12. In *C v. U. S.*, 23 Ct. Cl. 341, where the defendant contracted to deliver goods within a specified time, but delivered them sometime thereafter, he will be liable for any reductions of the plaintiff's profits caused thereby.

13. In *Y S v. B*, Fed. Case 14690. Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it, at a trifling expense, or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.

14. In *B v. M*, 50 Ala. 206, an action against the proprietor of a school for the breach of a contract to employ plaintiff as a teacher, defendant may show, in mitigation of damages, that the plaintiff obtained other employment during the time covered by the contract, and received compensation for it.

15. In *O v. G*, 18 Minn. 429, notwithstanding a note is expressed to be payable without interest, interest is recoverable as damages for the detention of the money after due.

CHAPTER XII.

HOW TO DRAW UP A CONTRACT

89. OTHER POINTS TO BE OBSERVED

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2. Short Contract

90. CONSTRUCTION WORK—Directions

91. HYPOTHETICAL PROBLEMS

92. SEARCH QUESTIONS

89. Other Points to be Observed. When contracts of importance are made the substance of the conversation should be reduced to writing and signed by the parties, and each should have a copy. Particularly should these directions be followed if the contract is to continue in force for some time, or if it contains many provisions. Remember, however, that while a verbal contract is just as valid as a written one, it is not so easily proved. An oral contract that is disputed or denied must be established by the testimony of witnesses. A written contract is established by its production.

1. *Caution.* Since it is advisable to reduce important contracts to writing, the rule, "no oral evidence can be admitted to explain, vary, or contradict that which is written," must be kept in mind. The written contract must contain the four principal elements of contracts together with such additional and modifying matter as may be desired. Grammatical error will not affect the validity of the contract. No special form is necessary. State clearly the intention of the parties. The contract must be signed.

2. *Short Contract—Merchant and Clerk.*

"This agreement made this first day of July, 1913, between E. C. Coe, and James Leffring: Witnesseth that it is agreed that the said E. C. Coe shall faithfully serve the said James Leffring

as a bookkeeper in the store of the said James Leffring for the period of seven months from and after the first day of August, 1913, then the said James Leffring shall pay the said E. C. Coe the sum of seventy-five dollars per month, payable monthly on the last working day of each month of this contract.

Signed in duplicate on the 1st day of July, 1913.

E. C. Coe.

James Leffring."

90. Construction Work. *Directions.* Supply all necessary names, terms and descriptions not given. The teacher will give amounts and other limiting data.

1. Draw a short contract between A and B, one to sell and the other to buy a team of horses; consideration, \$300, in three payments of \$100 each, first payment one month after date of sale. Warrant the horses "broken to double harness and sound."

2. Draw an agreement to sell and buy seven articles of personal property.

3. Draw an agreement to sell and buy a piece of land. Describe location of land in general way. Assume a mortgage and agree to furnish an abstract. Also a warranty deed is to be given.

4. A agrees to sell to B the following described property: One horse, "Duke," at \$250; one horse, "Walter," at \$225; one set double harness at \$200; one light buckboard at \$175. Draw the agreement once as an entire contract and again as a divisible contract.

5. Draw an agreement (1) in accordance with the first clause of section four of the Statute of Frauds.

6. (2) In accordance with the second clause of section four of the Statute of Frauds. (a) Contract executed. (b) Contract executory.

7. (3) In accordance with the third clause of section four of the Statute of Frauds.

8. (4) In accordance with the fourth clause of section four of the Statute of Frauds.

9. (5) In accordance with the fifth clause of section four of the Statute of Frauds.

10. (6) In accordance with the section of the Statute of Frauds relating to the sale of goods.

91. Hypothetical Problems. 1. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "Agreed." Discuss the relationship.

2. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "I will give you \$95;" or he may say, "I will give you \$105." Discuss the relationship.

3. A says to B, "I will sell you my horse, Prince, for \$100." C, a third party, says, "I will take him at that price." Discuss the relationship.

4. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "Agreed, I will pay you the money to-morrow." Discuss the relationship.

5. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "I will give you my note at 10 days for \$100." Discuss the relationship.

6. As in 5, B then says, "Well, I will take him for \$100." Discuss the relationship.

7. A says to B, "I will sell you my horse, Prince, for \$100, and you may consider the offer until 2 o'clock to-morrow afternoon." B replies, "Agreed." Discuss the relationship.

8. As in 7, C, knowing of A's offer to B, says to A, "I will take your horse for \$100 now." A says, "Agreed." Discuss the relationship of A, B, C.

9. A proposes as in 7, B replies, "Well, here is \$2 for your offer." Discuss the relationship.

10. As in 7, C pays the \$100 and takes possession of the horse. Discuss the relationship.

11. D writes B September 4th, "I will sell you 1,000 bu. wheat at 50c per bushel. Reply by first mail." The letter will be delivered on the 6th. Discuss the relationship.

12. As in 11, B receives the letter on September 6th and mails acceptance, which will be delivered the 8th. Discuss the relationship.

13. Conditions as in 11 and first part 12, but the letter of acceptance is lost. Discuss the relationship.

14. Conditions as in 11 and 12, but on September 5th B writes and withdraws his offer. Letter delivered September 7th. Discuss the relationship.

15. Conditions as in 11, but on the 5th A telegraphs his withdrawal; the telegram and offer are delivered to B together. B writes and mails acceptance. Discuss the relationship.

16. Conditions as in 11 and 12, but on September 7th B telephones A that he cannot accept his offer of the 4th. Discuss the relationship.

17. A sells a piece of porcelain to B. B thinks it is Cordon ware, while A does not think so. Neither knows what the other thinks. Discuss the relationship of parties.

18. Again—as above, B thinks it is Cordon ware, while A knows that it is not Cordon ware and knows that B thinks it is Cordon ware. Discuss the relationship.

19. Again as above, B thinks it is Cordon ware and thinks A intends to sell it as such. A knows it is not Cordon ware, but has no knowledge that B thinks he is selling it as Cordon ware. Discuss the relationship.

20. Again as above, B thinks it is Cordon ware and also thinks that A is selling it as such. A knows these conditions. Discuss the relationship.

21. H, seventeen years of age, buys an automobile of K, an adult, for \$2,500, and gives his promissory note in payment for same. Discuss K's rights.

22. As in 21, let H sell an automobile to K and take K's note in payment. Discuss H's rights.

23. May 1, 1898, Long, of Chicago, ordered by cable a quantity of hemp from Lopez, of Manila. Lopez received the cablegram and later Long refused to accept and pay for hemp. Discuss rights of Lopez.

24. K, who has been adjudged insane, purchases from G a valuable painting for \$10,000 and gives his note in payment. Discuss the rights of the parties.

25. A, B and C are liable on a contract. Judgment for the full amount is obtained against C and he pays it. Discuss his rights.

26. E loses a bet of \$50 upon a horse race and gives his note payable to bearer in payment. The note is transferred and suit is brought upon it. Judgment for whom?

27. A enters into a contract with Alderman Blank, agreeing to pay him \$100 if he will procure the passage of a certain ordinance. Blank procures the passage of the ordinance and later sues A upon the contract. Judgment for whom?

28. S is engaged in the retail saddlery business. R buys him out and binds him by contract never again to enter that business in the United States. Within a year S starts again in the same business in the same town and R brings suit for damages. Judgment for whom?

29. Suppose, in No. 27, A has paid the \$100 to Alderman Blank and afterward seeks by suit to recover it. Judgment for whom?

30. R, an artist, out of friendship for L promises to give him a valuable painting. He later refuses to carry out his promise and L brings suit. Discuss their rights.

31. Suppose R, in No. 30, had delivered the picture and was suing for its return. Judgment for whom?

32. A buys of B a stock of goods in a warehouse located in another city and pays cash. It is learned later that the warehouse and its contents were burned before the date of the transaction. Discuss their rights.

33. L is in failing circumstances. For a nominal consideration he conveys valuable real estate to M, who has full knowledge of his financial condition. Discuss the rights of M and the creditors of L.

34. Later, after full settlement with his creditors, L seeks to enforce an agreement between himself and M for the reconveyance of the real estate. Judgment for whom?

35. D promises to accompany E on a pleasure trip, but afterwards wilfully refuses to keep his promise. E brings suit, alleging that after D's promise he incurred certain expense of which D knew nothing. Judgment for whom?

36. X's house is about to be swept away by a flood. Y, a stranger, unrequested gives material aid in saving the household goods of X, who later agrees to pay him for his services. Can Y enforce the agreement?

37. A owes B \$500 due June 1st. On May 25th A pays B \$350 and takes B's receipt for settlement in full. Later B sues A for the difference, \$150. Judgment for whom? Suppose the same settlement had been made June 5th.

38. B, administrator of C, in conversation with A concerning a board bill due from C to A, stated that he would see it paid. Is B bound by this promise? 4 Jones (N.C.) 196.

39. E owes F \$50. H, a friend of E, promises to pay the debt. He fails to do so and F sues. Can he recover? Suppose H had written a letter to F stating that he would pay E's debt.

40. T, being about to marry M, orally agrees to release and renounce all interest in her intended husband's estate after his death. Is she bound by her agreement? 120 Ill. 26.

41. D orally agrees to sell his farm to E for \$8,000. E later tenders the money and demands a deed. D refuses to carry out the agreement. Can E enforce it?

42. In October F agrees verbally to lease his farm to G for one year to commence March 1st. F on March 1st refuses possession. What are G's rights? 19 Ill. 576.

43. A, the heir of B, is left nothing by his father's will and threatens to contest it. C, the executor, promises to pay him \$5,000 if he will let the will stand. Can A enforce this agreement? Will it make any difference whether this agreement is in writing or not?

44. G says to H, "I will give you \$1,000 for your automobile." H replies that he will take \$1,200 and if G wishes will give him two days in which to accept. G assents to this. On the day following H sells to K. G consults you—how will you advise him?

45. A was guardian of B, who has just attained her majority. Since reaching full age she has sold valuable property to A for much less than its full value, being ignorant as to the same. Discuss B's rights.

46. S, under threats of prosecution against her son for a felony, is induced to convey to T valuable real estate. She comes to you for advice. Discuss her rights.

47. A sells B a horse to be delivered on June 1st for \$100. On May 3d, still having the horse in his possession, A sues B for the money. Discuss their rights.

48. D contracted with F, an artist, to make a portrait of him. F died before executing the contract. What are D's rights? Suppose the contract had been for the purchase of a farm.

49. A Co. agree to furnish B Co. certain structural iron in 60 days. Employes of A Co. strike and it is unable to fulfill its agreement. Is this a good defense to B Co.'s suit for non-performance?

50. L agrees to deliver M 1,000 cords of wood, 100 cords a month to be delivered for ten months. The first month he delivered 80 cords, the second month 60 cords, and the third month 70 cords. M then refuses to accept any more wood and L sues for breach of contract. Discuss their rights.

51. A claims B owes him \$600. B denies the amount, but admits he owes A about \$400. Finally, after comparing claims, they agree to call the amount settled by B's paying A \$450. Discuss the relationship.

52. After agreement as in 51, A sues B for the full amount he claims, \$600. He is able to prove this account. Discuss the relationship.

53. As in 51, but B pays the \$450. A afterwards attempts to collect the remainder, \$150. Discuss the relationship.

54. A buys property from B for \$5,000, but before payment in full is made it appears that B has damaged this property to the extent of \$1,000. Discuss the relationship.

55. A owes B \$100 and tenders him in payment 25 pennies, dimes and quarters \$9.75, and 90 silver dollars. B refuses to accept, claiming it is too inconvenient for him to carry. Later he sues A for the account, \$200. Discuss the relationship.

56. Same as in 55, but the \$90 is in National bank currency. Discuss the relationship.

57. A owes B an open account of \$500 due July 1, 1906. On Sept. 1, 1908, A leaves the state and is absent five years. On Oct. 1, 1913, B enters suit for the claim and interest. A's defense is statute of limitations. Judgment for whom and for what amount?

58. A buys 50 bushels of special seed wheat from B at \$5 per bushel. He sows this on 25 acres of land for which the rental value is \$7 per acre. The seed is worthless. It is estimated that the ground lying fallow for the season is a benefit of \$2 per acre. Labor paid for plowing, harrowing, and seeding amounts to \$55. Judgment for how much?

92. SEARCH QUESTIONS (State Laws)

What does your state statute say about seals on contracts?

What are the contractual limitations placed on minors, married women, and aliens?

What do the statutes say, if anything, about wagering contracts?

What do they say about contracts made on Sunday?

Is there any distinction between joint contracts and joint and several contracts?

Do you find any provisions regarding the Statute of Frauds? What are they?

Compare what you find with the several sections mentioned in this text. Are any omitted, and if so which ones?

If any section is omitted, how many contracts relating to this section be formed?

Look up the following terms and find out if the statutes have anything to say by way of addition to what you learned in the text: mistakes, misrepresentation, undue influence, and duress.

What is the term of the statute of limitation: for open, or book accounts? for contracts in writing?

If a minor ratifies a previous contract at majority must the promise be in writing?

CHAPTER XIII

AGENCY

- 93. INTRODUCTION
- 94. NECESSITY
- 95. DEFINITION
- 96. NATURE OF CONTRACT
- 97. WHO MAY ACT
- 98. DISTINCTION BETWEEN AGENT AND SERVANT
- 99. CLASSES OF AGENTS
- 100. FORMATION OF CONTRACT
 - 1. By Agreement
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- 101. DELEGATING AUTHORITY
- 102. JOINT AGENTS
- 103. JOINT PRINCIPALS
- 104. FORM OF CONTRACT
- 105. RECAPITULATION
- 106. QUESTIONS

93. **Introduction.** In the subject just completed, was included a general consideration of the nature, requisites, validity, interpretation, operation and enforcement of contracts, oral and written, and the persons or classes of persons, natural or artificial, having contractual powers and capable of assuming contractual duties, but without special reference to particular classes of contracts or in respect to particular kinds of property. The chief aim was to firmly fix the fundamental principles which underlie

all contractual relations, the special application being left for subsequent classification and treatment.

94. Necessity. The needs and the magnitude of business are such that the business man cannot personally supervise and make all the agreements and obligations necessary to conduct a large and widely scattered business. Consequently, he appoints others called agents to do his bidding.

95. Definition. An agent is one vested with authority to bring about a contractual relationship between his principal and a third person. The idea of agency necessitates the relationship of three parties: the principal who gives authority, the agent who accepts and acts under and through this authority, and the third person whose willingness to do business with the agent brings about a contract which, while made with the agent, binds the third party and the principal. The authority of the agent may be delegated by the principal or by operation of law. The authority for performance may be given subsequently to the act. Subsequent ratification is equivalent to prior authority when it confirms a demand against the one ratifying.

96. Nature of Contract. The law of agency rests on the maxims "He who acts through another acts in person" and "He who has authority to act has power to appoint another to act in his stead."

The fundamental elements of contracts form the foundation of agency. The contract formed by the agent must submit to the same analysis as though made by the principal. Agency is a means to an end. The agency is the instrument through which the various details of business are consummated.

97. Who May Act. We will deal first with the competency of the principal, and second with the ability of the agent to intelligently follow the instructions of the principal. No principal can enter into a contract through an agent that he himself could not make. An agent need not be competent to make a

binding contract for himself, but must be sufficiently intelligent to form contracts in accordance with the powers delegated to him by his principal. A minor, while not being able to make a personal contract, may be competent to make contracts for another.

98. Distinction Between Agent and Servant. Not all who act for another are to be classed as agents. The chief distinction between an agent and a servant is in the nature of the act performed. The agent brings about a relationship between his principal and a third person that results in a contract, while the servant has no such rights or powers conferred on him. One makes a contract, the other performs some act. One person may be both a servant and an agent. A captain of a vessel as such is a servant, but coupled with this appointment is authority to hire a crew or pledge for credit. He would be an agent while performing the latter.

99. Classes of Agents. While authors generally classify agents as general and special, there is practically nothing to be gained by this classification, as in each case the authority must come from the principal either by delegation or by operation of law. In each case the agent is bound to follow instructions and to be loyal to the interests of his principal. The third party is bound to take notice of the authority vested in the agent to limit either his authority or the scope of work to be performed; neither does it make him a general agent to give him full discretion in bringing about the desired end. A person who consummates contractual relationship between a principal and a third party is an agent pure and simple. "No man is at liberty to send another into the market to buy and sell for him, as his agent, with secret instructions as to the manner in which he shall execute his agency which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from these instructions, say that he was a special agent, that the instructions were limitations upon his authority, and that those with whom he dealt, in the matter of his agency, acted at their peril because they were bound to inquire, where inquiry would have been fruit-

less, and to ascertain that of which they were not to have knowledge." "The rule is, that if a special agent exercise the power exhibited to the public, the principal will be bound even if the agent has received private instructions which limit his special authority." The doctrine as above quoted recognizes no such classification as special and general agents. If the third party has acted in good faith and has exercised reasonable diligence in determining the agent's authority, and an agency does exist, the principal is bound.

100. Formation of Contract. The formation of the contract rests on the mutuality of the parties bound. The agreement implies an offer and an acceptance. The elements of parties, subject matter, consideration, agreement, time, and form need no discussion at this time or place. They have been fully discussed under the subject of contract. Our aim and investigation will bear entirely on the new element introduced—the agent—and the new relationship thereby raised.

1. *By Agreement.* The greater number of agents are appointed as the result of an agreement between two persons, whereby one agrees to appoint and the other to accept such appointment and act for the other.

2. *By Implication.* If the party acting or holding himself out as the agent of another transacts business for the supposed principal in such a way that the public is led to believe an agency exists, and the principal knows this to be so, the law implies an agency to exist. This is for the protection of the public. If such conditions exist with the knowledge of the principal and he does not wish to be bound, it is his duty to object and thereby prevent third parties from entering into the agreement. If, however, the supposed principal has no knowledge of the representation and in no way lends aid, there is no liability on his part. There must be knowledge of the representation or a careless indifference that deters him from such examination as a man of ordinary forethought would make, in order to render one liable as principal.

3. *Authority.* The right to appoint an agent to perform for one depends upon the power to form a contract. Where individual authority to make a contract exists there also is found appointing power. The principal must possess contractual ability; the agent, the ability to faithfully follow instructions.

4. *Ratification.* If the representation of agency is made when in fact no agency exists, and contractual relationship is made with a third party, the agreement may be ratified by the principal and the benefits of the contract will inure to the profit of the principal, a subsequent ratification being equivalent to the giving of prior authority. The weight of authority is that such ratification does not bind the third party. He has a right to object to the contract, as he has a right to do business with one having authority. The ratification of the principal irrevocably binds him, and the contract is complete unless the third party refuses to be bound.

By the acceptance of a contract made by an agent where he has exceeded his authority, the agent's power to bind the principal is enlarged. The agent may not have the right to act, but he frequently has the power to act and bind the principal.

The agent is bound to follow instructions, but if he exceeds his authority and the principal ratifies the act, the agent's power to act is thereby enlarged so far as the third party is concerned. A appoints B to buy grain for him, giving him the usual authority to do so. A buys and ships grain and B is generally recognized as A's agent. A instructs B not to buy wheat during certain months. B nevertheless buys wheat. A is bound, as the third party has no knowledge of the instructions. Again the party knows of the instructions to the agent, notwithstanding he sells wheat to A through his agent, B, which contract is ratified by the principal. Other similar contracts may now be made with the agent and be enforced, although the agent has no right to make the contract.

101. *Delegating Authority.* As a general rule an agent is appointed to do a particular act or acts, generally relating to a cer-

tain business, the performance being essential and not a means through which it is to be accomplished. Therefore, it follows that the agent may appoint assistants. If, however, the appointment is of a personal nature in which the individuality of the agent is considered, the authority cannot be delegated to another.

“An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment, otherwise, however, as to powers and duties merely mechanical in their nature.”

102. Joint Agents. As to whether an agency is joint or joint and several is a question of construction. If the former, the agents must act jointly; if the latter, they may act jointly or severally.

103. Joint Principals. When there are several principals not legally related, as in a partnership, the agent or agents must have the express or implied authority of each principal to the appointment in order to make contracts that bind the principals. All non-incorporated or non-partnership associations, as certain clubs, societies, etc., fall in this class. Not even a majority vote will join minority members in a liability unless they by acquiescence ratify the control of the majority.

104. Form of Contract. The general law of contracts is applicable, the majority of contracts may be made orally by an agent. If, however, the law directs that certain contracts or evidence thereof must be in writing, then the agent must comply. The Statute of Frauds is an example. If the agent is to make a contract that is to be signed, sealed and delivered, his appointment as an agent must be in writing, signed and sealed, and is generally known as a power of attorney.

105. RECAPITULATION

Agency is a subdivision of contracts.

The magnitude and diversity of business necessitates agency.

An agent is an authorized representative.

The possession of ability to form a legal contract is necessary to appoint an agent.

Anyone having discretion may act as an agent.

The agent's act is the act of the principal.

An agent establishes contractual relationship between his principal and a third party.

A servant performs an act for his principal with a third party.

The contract between agent and principal may be either express or implied.

The appointment may be subsequent to the performance of the act.

An agent to perform a ministerial act may delegate it.

An agent must follow instructions.

An agency may be joint or joint and several.

106. QUESTIONS

Define agency. Why necessary? Who may act as a principal and appoint an agent? Who may act as an agent? May one act as agent who could not act as principal? Give reason.

What is the nature of the contract? Distinguish between agent and servant. Name the classes of agents. Is this distinction essential? How may the contract of agency be formed?

Explain "Subsequent ratification is equivalent to prior authority." Point out the difference between the power and the right of an agent to act. What limitation is there to be placed on agents' authority to delegate power? When is an agency joint and when joint and several? What is the rule in regard to the form of the contract between agent and principal?

CHAPTER XIV

RELATIONS OF AGENT AND PRINCIPAL

107. INTRODUCTION

108. NATURE OF CONTRACT BETWEEN AGENT AND PRINCIPAL

1. Duty of Principal
2. Duty of Agent
3. Compensation
4. Outlay
5. Lien
6. Instructions
7. Skill
8. Accounting

109. NATURE OF CONTRACT BETWEEN PRINCIPAL AND THIRD PARTY

1. Authorized Contract
2. Unauthorized Contract
3. Scope of Authority
4. Torts of Agents
5. Notice
6. Public Agents
7. Liability of Third Party

110. NATURE OF RELATIONSHIP BETWEEN AGENT AND THIRD PARTY

1. When Agent Is Bound
 - (a) Real and Apparent Authority
 - (b) Representation as Principal
 - (c) Assumes Risk
 - (d) Incompetent Principal
 - (e) Under Seal
2. When Neither Party Is Bound
 - (a) Death
 - (b) Assumes Risk
 - (c) War
 - (d) Public Agents

111. RECAPITULATION

112. QUESTIONS

107. Introduction. The chief phases of the subject to be considered in this chapter are, the obligations of the principal toward the agent and the obligation of the agent toward the principal.

108. Nature of Contract Between Agent and Principal. The relation between the agent and principal is wholly dependent upon the contract existing between them. The chief duty of each is to carry out this agreement in all its details.

1. *Duty of Principal.* The principal's chief duty is to pay the agent the agreed compensation as per contract.

2. *Duty of Agent.* The duties of the agent to the principal are also dependent upon the agreement and may be enumerated as, (1) loyalty to principal; (2) the use of ordinary care and skill in performance of duties; (3) subordination of personal interests to those of his principal. If instructed to buy for the principal the agent cannot sell his own goods. He cannot act as buying agent for one principal and selling agent for another. He cannot faithfully serve two masters.

3. *Compensation.* The contract existing between the two parties should settle the question of consideration for the agency. In the absence of express agreement resort must be had to custom or the usages of trade. If it can be shown that the agent was requested to perform, or the performance was with the knowledge of the principal, the agent is entitled to reasonable compensation. In determining the question of compensation the reasonableness of the contention for or against compensation must be shown.

Where one acts as agent for two parties with their knowledge, he is entitled to compensation from each; as, where A was appointed selling agent for B and buying agent for C and brings about a contract between the two, each must pay for his services. However, in this case his relationship is more that of an intermediary than of an agent. If the services are of an illegal nature no compensation may be recovered by the agent.

4. *Outlay.* For all necessary expenses incident to the agency the agent is to be reimbursed. If in the performance of his duty the agent becomes liable, he is to be indemnified by his principal.

5. *Lien.* If an agent has a right to compensation, reimbursement or indemnity, it must necessarily follow that some method is given him of enforcing his right. The principal method is a right of lien. This is a possessory right and is lost when possession of the goods passes to the principal. Briefly, a lien is a right to hold goods belonging to another until some claim incurred in their behalf has been paid. The subject of lien will be more fully discussed elsewhere. There are two classes of liens, special and general. The former is the right to retain the goods of another until charges relating to those particular goods have been paid; the latter is the right to retain the goods until a general balance has been paid.

6. *Instructions.* The relationship of agent and principal is of such a confidential nature that the law is very strict in holding the agent bound to follow instructions. It is no defense for him to say that he exercised great care and forethought in transacting the business. If he had other instructions he is liable for all losses that may arise. A landlord gives his agent instructions not to deliver a lease until certain arrearages have been paid. Suppose the agent delivers the lease upon receipt of a check and the check proves worthless. The agent is liable for the loss. Any deviation from instructions is at the risk of the agent. The utmost good faith is exacted of all agents. The single purpose of the agent must be to advance the interest of the principal. An agent must not acquire an interest in property that is antagonistic to that of his principal.

7. *Skill.* The agent is bound to use ordinary skill, care and diligence in the prosecution of the agency. The nature of the business determines the measure of skill. Thus an agent to buy land must possess the skill usually found among such agents, while one to purchase machinery should be a skilled mechanic. However, a determining element is the knowledge the principal

possesses of the character and ability of the one he appoints to act for him.

8. *Accounting.* The agent must conduct the affairs of his principal in such a way that a true and correct statement may be rendered at regular intervals, or within a reasonable time after demand. If the accounts are so carelessly kept that what belongs to the agent is hopelessly mixed with that of the principal, then it all belongs to the principal. All profits that result from the agency contract, as the accumulation of interest, belong to the principal. If an agent instructed to sell wheat to-day disregards instructions and holds until to-morrow, when he secures a higher price, the advantage belongs to the principal. If, however, the price has diminished, the loss would fall on the agent. The agent assumes all responsibility in case he does not follow express or even implied instructions.

If the agent has a claim against his principal which would ordinarily result in a set-off or a counterclaim, he may not exercise it if by doing so it would defeat the agency. A instructs his agent, B, to collect certain rents, deduct his commission and apply the balance to a claim owing C. Here, although B may have a valid claim against A, he will not be allowed to set it up against A. It would defeat the agency. The agent's duty to be loyal to the principal prevents him from denying the title of the principal. If as a result of the agency he comes into possession of property belonging to the principal, he is not allowed to deny title in the principal even though the transaction had been illegal or the proceeds are to be used for an illegal purpose.

109. Nature of Contract Between Principal and Third Party. The object of the contract of agency is to bring about the relationship of contract between the principal and a third party. The agent by faithfully following instructions and acting within the scope of the business, brings about the desired end. In this case there is little difficulty in determining the rights and liabilities of the chief parties. It is when the agent has but apparent authority and has exceeded his instructions, or is not

clearly within the scope of the business, that difficulty arises. Everyone has a right to have the one with whom he contracts carry out those contracts; consequently the contention is to enforce agreements against the principal. He is supposed to be the responsible party legally and financially.

1. *Authorized Contract.* Where the principal has authorized a particular contract there is no uncertainty in reference to parties, authority, or scope of business. In such case the contract made by the agent binds both principal and third party.

2. *Unauthorized Contract.* Granted that an agency exists for the purpose of making contracts, still the agent may disregard instructions given at the time of the appointment or subsequently. Now, the agent having formed a contract of this character, the question arises, Shall the principal be bound? Clearly here is a contract that he did not authorize or intend to enter into. So far it does not appear to justify the liability of the principal. The true solution can only be arrived at, however, from the viewpoint of the third party, the general public. A wrong has been done; who should suffer, the principal or the third party? Clearly the one who caused or made it possible to form the contract. The agent was selected and appointed by the principal. He should exercise care and discretion in delegating contractual powers to another. The third party dealing with the agent is justified in believing that the agent has some authority, such authority as is necessary, and also implied authority, to successfully complete the agency. The third party must use ordinary care in ascertaining the authority of the agent. Having done so, the principal is bound.

3. *Scope of Authority.* The foundation of the agent's authority is his appointment. Express authority is that actually given by the appointing power; implied authority, that which is an incident. In other words, it is that which naturally and reasonably grows out of express authority. It is the additional and relative authority that must be assured in order to consummate the agency fully. Apparent authority is that which one would naturally suppose to exist from the acts of principal and agent.

If no authority exists in a restricted form, usage of trade may give the agent additional authority to act. This does not, however, modify or change express authority.

4. *Torts of Agents.* A tort is a wrong for which the law gives a remedy in damages. A principal is liable for his own torts. He should be liable for all torts brought about through the instrumentality of an agent. The principal is liable if he ratifies the act of the agent, which may be brought about by accepting the profit produced. This is so even though he expressly forbids the act.

The principal is liable for all torts committed by the agent within the scope of the employment.

"This rule of liability is not based upon any presumed authority in the agent to do the acts, but on the ground of public policy and that it is more reasonable when one of two innocent persons must suffer from the wrongful act of a third person that the principal, who has placed the agent in a position of trust and confidence, should suffer than a stranger."

5. *Notice.* Notice to an agent (while engaged in the business of the agency) is notice to the principal.

"The rule that notice to the agent is constructive notice to the principal is based on the presumption that the agent has communicated to the principal the facts connected with the subject matter of his agency, which came to notice."

There is considerable confusion in the decisions as to whether notice acquired by an agent outside of the business of the agency is notice to the principal.

6. *Public Agents.* The duties of public agents are clearly outlined by law. All third persons are presumed to know the law, and if such an agent should exceed his authority he would not be bound personally. No contract would exist.

7. *Liability of Third Party.* The relationship of third party to the principal is the same as in a contract in which the agent is eliminated. He accepts and does business with the agent as a medium.

110. Nature of Relationship Between Agent and Third Party. The authority vested in the agent enables him to bring about contractual relations between his principal and the third party. The agency is created for this purpose, and if the agent has followed instructions and is clearly within the scope of the business he assumes no liability. He has formed an authorized contract.

However, there are several ways in which an agent may become personally liable.

1. *When Agent Is Bound.* (a) *Real and Apparent Authority.* If an agent exceeds both real and apparent authority, he has formed an unauthorized contract. Should the principal subsequently ratify the act of the agent, the principal's liability would be added to that of the agent. The ratification by the principal would release the agent from any damages that might arise. The third party would doubtless have the right to reject the contract or hold either party to the agreement.

(b) *Representation as Principal.* If the agent holds himself out as the principal, the third party may object to doing business with the principal, and this may be the reason for the withholding knowledge of the agency contract. The benefit of the contract belongs to the principal. If the principal is revealed, the third party has the right of election as to the party he will hold liable.

(c) *Assumes Risk.* When the agent assumes the responsibility of the contract, and in order to secure the contract, specially offers to make the principal's responsibility his responsibility, then the agent is liable. This is nothing more than the old rule that one must live up to his contracts.

(d) *Incompetent Principal.* When a person offers to do business as the agent of another, he not only represents that he has authority to act, but his principal has power and authority to create such agency; otherwise the agent becomes liable for all damages. The third party must show that he has suffered damages caused by the disaffirmance of the incompetent principal.

(e) *Under Seal*. If the agent enters into a specialty contract using his own name in the agreement, he is liable whether the principal be known or unknown.

2. *When Neither Party Is Bound*. (a) *Death*. The death of the principal works a revocation of the agency, and a contract formed after that event is a mere nullity.

(b) *Assumes Risk*. If the agent discloses all the authority to the third party, and this authority is insufficient, a contract formed as a result of this will not be effective. The principal did not authorize it nor did the agent warrant his authority. The risk is with the third party, as he is the judge of the sufficiency.

(c) *War*. The beginning of hostilities between the respective countries of the parties suspends all contractual relations between such parties.

(d) *Public Agents*. All officers of cities, states, and the general government are agents of such principals. Their contractual powers are clearly indicated and limited. The public is held to have knowledge of these rights and duties. Such agents assume no personal liability in the contracts that they enter into in behalf of their respective principals, even though they exceed their authority.

111. RECAPITULATION

The relation between agent and principal is regulated by the law of contracts.

The agent is entitled to compensation, he must possess skill and ability, and he must be loyal.

An agent cannot serve two masters; therefore must make an accounting.

The principal is liable on all authorized contracts, whether express or implied.

If the principal allows a party to represent himself as an agent he will be bound by the contract.

A principal is responsible for the torts of his agent.

Notice to an agent is notice to the principal.

Public agents are not personally liable if they exceed contract powers.

The third party must not interfere with the contract of the agency.

An agent is liable to a third party if he exceeds his authority.

The principal assumes the liability if he ratifies the agreement either expressly or by implication, by taking the benefit.

An agent is liable to a third party if he holds himself out as principal, or conceals his principal, or has a fictitious principal.

An agent warrants the competency of his principal.

A contract made by an agent subsequent to the death of his principal is a nullity.

A state of war between the respective countries of the contracting parties suspends the contractual relationship.

112. QUESTIONS

What is the relationship between agent and principal? Discuss the duties of each. What is the rule as to compensation and outlays made by the agent?

What is a lien? What is the rule relating to instruction? Discuss skill of an agent.

What do you understand by saying that an agent must make an accounting? What is the nature of the contract between the principal and the third party?

Explain how principal may be bound when agent exceeds authority. What is the scope of the agent's authority? What is the rule in regard to an agent's torts? What is the rule of notice? What are the duties of public agents?

What is the relationship of third party to principal? What is the nature of the relationship between the agent and the third party? When is the agent bound? When is neither party bound? State the rule in regard to the liability of public agents.

CHAPTER XV

TERMINATION OF AGENCY

- 113. INTRODUCTION
- 114. REVOCATION
- 115. NOTICE
- 116. LIABILITIES
 - 1. Coupled With an Interest
- 117. REMUNERATION
- 118. BY OPERATION OF LAW
 - 1. Death
 - 2. Insanity
 - 3. Bankruptcy
 - 4. Destruction of Subject Matter
 - 5. Marriage
 - 6. War
- 119. RECAPITULATION
- 120. QUESTIONS
- 121. DECISIONS BY THE COURTS
- 122. HYPOTHETICAL PROBLEMS
- 123. SEARCH QUESTIONS

113. Introduction. Mutuality is a predominating factor in the formation of the agency contract. The needs of business created the necessity. The contract affects but the agent and principal, and since this contract is formed as a result of an offer and an acceptance it may be cancelled by a like process.

If the agency is for a single act, or a certain time, the accomplishing of the act or the expiration of the time works a dissolution of the agency so far as the parties are concerned.

114. Revocation. The contract of agency is of a confidential nature, and since the principal has conferred the authority

on the agent he should have the power to annul the appointment. This is true even though there may be an agreement to the contrary. The principal has the power to sever, at all times, the relationship although he may not have the right.

The agent's authority to act may be revoked by express statement to that effect, or it may be by implication where the principal acts in such a way that it is impossible for the agent to act, as when an agent is appointed to rent certain property belonging to the principal, who sells same before the agent can act.

115. Notice. So far as the principal and agent are concerned, the notice of revocation to the agent, either express or implied, terminates the agency, but in order to fully protect himself the principal is obliged to give notice to all third parties with whom the agent has transacted business or who have knowledge of the appointment. The nature of the notice would depend upon conditions. If the third party received actual notice, it would be sufficient. If he has information that would be investigated by a person of ordinary caution, and who does investigate and thereby receives notice, it is sufficient. Notice is generally effected by a written communication being mailed to all customers who have had dealings with the agent and a notice by publication to all others.

116. Liabilities. While, undoubtedly, the principal has the power to discharge, he is bound to respect the contracts with the agent or be held in damages.

1. *Coupled With an Interest.* An agent who possesses an interest in the agency cannot be discharged by the act of the principal. This must not be confounded with a percentage of profit that the agent may receive as the result of the agency contract, which is not sufficient to prevent his discharge. An agent is appointed to sell certain property, deduct commissions, and place the proceeds to the credit of the principal on a debt due the agent. The agency in which the agent has an interest cannot be terminated by the principal.

117. Remuneration. If one party has the right or power to terminate a contract, certainly equity and justice demand the same right for the other party. This is generally so. The remuneration may be by express agreement or may arise by implication. The principal in order to protect himself from subsequent acts of the agent must notify third parties.

If an agency is for an indeterminable period the agent has the power and right to terminate the contract at any time. If, however, the agency is to endure for a definite period, the remuneration may be by express agreement or may arise by implication.

If the contract is for personal service of extraordinary skill and ability the agent may be enjoined from using his services elsewhere.

118. By Operation of Law. The relationship of agency may be terminated by operation of law in several ways, namely: death, insanity, bankruptcy, destruction of subject matter, marriage, war.

1. *Death.* The death of either party terminates the agency at that moment. Contracts made by an agent after the death of a principal, even though the death may not be known to either agent or third party, are of no force.

2. *Insanity.* Voidability is a consequence of a contract relationship wherein one party to the contract is insane. If the principal is insane, valid authority cannot be given; if the agent is insane, a termination of the agency results, as the agent does not possess the ability to follow instructions.

3. *Bankruptcy.* In case of bankruptcy of the principal his property is taken from him, his title vesting in a trustee for the benefit of his creditors.

4. *Destruction of Subject Matter.* If the subject matter of the agency should be destroyed, there is no reason for the continuance of the agency. If an agent is appointed to perform a certain act, as the selling of a horse, and the horse dies, or of a building, which is destroyed by fire, the agency terminates. If

two agents are appointed to sell the same piece of property the sale by one dissolves the other contract of agency.

5. *Marriage*. The marriage of a female at common law would work a dissolution of an agency, as, if a principal, her property would be under certain control by another, her husband.

6. *War*. If the agent and principal are subjects of different countries, a state of war would suspend the contract of agency, at least during hostilities.

119. RECAPITULATION

The principal may at any time revoke the authority of the agent to act.

The agent may at any time renounce the contract of agency.

Either may be liable to the other in damages.

Notice of revocation or remuneration should be sent to all third parties.

An agency may be terminated by operation of law, for death, insanity, bankruptcy, destruction of subject matter, marriage, war.

An agency coupled with an interest cannot be terminated by the principal.

120. QUESTIONS

What is the principal's authority of revocation? Limitation? Explain notice necessary to terminate the agency. Explain rule in reference to liability of principal in case of revocation.

What is the agent's power as to renunciation? What liability may follow? In what other ways may the agency be terminated?

121. DECISIONS BY THE COURTS

1. In *S Mfg. Co. v. R*, 132 U. S. 518, R was injured by carelessness of C, who was employed to sell machines and collect payments for them. In his contract he agreed that he would not hold himself out as an agent for the company and that the company was not responsible for his acts. Held, the company was nevertheless liable for the acts of C, who was both an agent and a servant.

2. In *P v. B*, 55 Ala. 435, plaintiff attempts to recover an interest in land conveyed while a minor, through power of attorney held by his father, to S, who in turn transferred to defendant. Held the transfer void and that defendant failed to show any defense to plaintiff's claim.

3. In *D v. N*, 42 B. Div. (C. A.) 661, action of plaintiff to recover for goods supplied to defendant's wife. The wife had been appointed agent. The defendant became insane. The insanity was not known to the

plaintiff. While in this condition the agent made the contract in question. Question raised, Does insanity put an end to the authority of the agent? What is the consequence when a principal's insanity is not known to a third person who has knowledge of the agency? Held that while insanity revokes the appointment as between agent and principal, the third party, however, is entitled to notice, which has not been given. When one of two persons, both innocent, must suffer by the wrongful act of a third person, that person making the representation which, as between two, was the original cause of the mischief, must be the sufferer and must bear the loss.

4. In *J v. D*, 17 Ill. 433, is considered the question of an agent signing the name of the principal to contracts to satisfy the Statute of Frauds. This was for the specific performance of a contract for the sale of land. H was an agent with verbal appointment to sell the land in question, and a contract was made with J in which H signed the name of D "per H." It was contended that H had not authority to sign the name of principal, only authority to sell. Held that the agent was authorized to negotiate and conclude the sale, and for that purpose authority was implied to do for his principal what would be incumbent on the principal to do to accomplish the same thing in person.

5. In *E v. S*, 44 Mich. 519, S subscribed for a book, price of which was \$10. Rules printed on subscription blank forbade agents making special contracts. Agent, however, took receipts from S, agreeing to take as payment fees of office as Justice. The receipts amounted to \$4.27, which was tendered after book was delivered. Suit brought for \$10. Subscription shows agreement to pay \$10, but contemporaneous paper constitutes part of agreement and both must be taken together. Held that only the special amount could be collected. The acceptance was for but that amount. When plaintiffs discovered special agreement, they should have ratified the act of the agent or have repudiated it and declined to deliver the book. They cannot ratify that part that favors them and repudiate the rest.

6. *D v. C*, 154 Mass. 360. Principles.—Legal effect of ratification. Plaintiff ordered coal of defendant. M, having no authority but representing the defendant, undertook to deliver the coal, and while so engaged broke a plate-glass window. Defendant presented a bill for coal, having knowledge of act of M, Action brought for damages. "The delivery of the coal by M was ratified by the defendant, and that such ratification made M in law the agent and servant of the defendant." Held that the defendant was liable for the tort. The ratification goes to the relation of the parties and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just

as he is for those which he has not commanded and as he may be for those which he has expressly forbidden. In *C v. H*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that subsequent payment for his work by the defendant would not make him one.

7. In *C v. G*, 163 Mass., the plaintiff was under a five-year contract with defendant, but was discharged after three months' service. Question, If suit is brought before expiration of term, may damages be assessed for full time? The trial court allowed damages to be assessed to the time of the trial, and from the trial to the expiration of the five years. In 24 Ala. 194; 75 Tex. 196; 7 Wis., if suit is begun before the expiration of contract period, damages can only be allowed to time of trial. In 31 Vt. 582, damages may be claimed for full term irrespective of time of bringing suit. In 67 Me. 64, in an action brought for damages at end of period, it was held damages were stipulated wages less whatever sum plaintiff earned or might have earned by use of reasonable diligence. Same in 44 Pa. 99. This is also the English rule. The suit is not for wages but for damages. In estimating damages the jury have the right to consider the wages which he would have earned under the contract, probability of life, working ability, and any other uncertainty, and likelihood that plaintiff would be able to earn money in other work. The same kind of difficulty is encountered in assessing damages in a personal injury case. The liability for the damages which he inflicts by breaking his contract, is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and, if he did not wish to be subjected to it, he should have kept his agreement.

8. In *D v. M*, 12 Met. Mass. 286, plaintiff contracted to work for defendant for seven months, plaintiff quit at end of three months. Suit for three months service. Held that contract was entire, and that plaintiff, having left the defendant's service before the time expired, could not recover for the partial service performed.

9. In *C v. S*, 142 Pa. 25, defendant was real estate broker and attempted to serve two masters. The plaintiff paid him a commission of \$5,000 for effecting a sale of certain real estate in ignorance of the fact that he was also the broker or agent of the purchaser. When she discovered that he was acting in the dual character, she brought suit to recover the money so paid. Held that the money so paid was recoverable. It did not depend upon the character of the sale, whether advantageous or otherwise; it rests upon the higher ground of public policy. The fiduciary relation existing between agent and principal is one of highest faith and the law protects it.

10. In *M v. E*, 94 Mich. 100, agent acted for both parties. Was to receive commission if he sold certain land for \$9,000. At the same time

agent represented prospective purchaser. He subsequently introduced parties. Sale was consummated. Purchasers paid regular commission. Seller paid part and resisted balance. Held agent could recover. Nothing was left to the discretion of agent but to find a purchaser willing to give the price asked, and it can be of no importance whatever to the defendants whether or not these purchasers also paid the plaintiff for any service he may have rendered them. As was said in *R v. D*, 78 Mich. 318: "A broker who simply brings the parties together and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other."

122. HYPOTHETICAL PROBLEMS

Discuss fully and give reason in each case.

1. A offers a book for sale to several parties present; B, the owner is present; C buys and gets the book. Can B object to the transfer of title to the purchaser?

2. A, an agent, has authority to buy grain for B with instructions not to pay more than a certain price. He pays more, however. Is B, the principal, bound?

3. A merchant directs his clerks not to sell certain overcoats in stock that are and remain in the salesroom. One of the clerks, nevertheless, makes a sale. Can the principal annul the contract?

4. A commissioner of public works lets a contract for paving, specifying certain thickness. A city ordinance requires a greater thickness. The contract is carried out. Is the city bound to pay? Is the agent liable?

5. An agent makes a contract with a third party in his own name. Is the principal liable?

6. An agent in selling goods makes false representations without the knowledge or consent of his principal. Is the principal liable? Would it have made any difference if he had specifically cautioned his agent to be honest?

7. A is an agent for B, and entered into a contract with C after B's death. Is the contract binding?

↓ 8. An agent is given authority to employ nine men. He employs eighteen men. Is the principal bound?

9. An agent makes a contract with a third party in excess of his authority. To whom does the benefit, if any, inure? On whom would a loss fall?

10. A instructs B to sell his horse for \$150. B sells the horse for \$175. To whom does the \$25 belong?

11. A instructs B, his agent, to employ labor on one of several houses in process of erection. B employs labor on all of the buildings. Under what circumstances, if any, is A bound to pay the extra laborers?

↓ 12. A is authorized by B to collect a debt from C. A employs D to make the collection, which he does and also spends the money. Who is liable to B? What recourse, if any, has A?

13. A, an engineer, is injured by the negligence of B, an engineer on the same road. Is the company liable?

14. A is a telegraph agent for a railroad corporation and is served with a summons to appear in court. Is this good service as regards the corporation?

15. An agent is directed to purchase a team for his principal. He transfers to his principal a team which he owns, charging a reasonable price. Discuss rights of parties.

+ 16. An agent is driving a load of grain to the market and at a cross road finds his way blocked by B, another driver, with team and wagon. A becomes enraged and purposely drives into and upsets B's wagon. Is A's principal liable for the damages? Would it make any difference if A in his hurry to get to the station accidentally ran into the other wagon and caused the same damage? Discuss.

17. Your class president, at a meeting of the class of fifty, offers for selection by the class several designs for a class pin. Five students are absent, and five object to the pin and vote against its adoption. The motion is declared carried by the president. Discuss the liability of the members of the class.

18. An accident occurs at a railroad crossing; the evidence at trial establishes the fact that the engineer failed to sound a warning and also that the party injured failed to take notice of the crossing signal. Discuss rights of parties.

123. SEARCH QUESTIONS

What amount of wages are exempt from garnishment?

What are servants' rights as to wages?

In case of a failure are servants' wages a preferential claim?

Is there an "Employers' Liability Act"? What are its provisions as to injury to one servant by another? What provisions as to safe tools and machinery, safe place to work, competent servants, rules and regulations, etc.?

Is there a law that dangerous machines such as threshing machines, laundry machines, circular saws, have gearings, etc., properly boxed?

May an employee who is injured by another employee in same capacity collect damages?

May an employee who is injured by defective machinery collect damages? If he knew the machinery to be defective? If he reported the defect to the employer, who disregarded the notice or intimated that someone else could run the machine?

Does your state allow the comparison of negligence, that is, allow damages where the employer was the more negligent?

Are foremen of shops, etc., known as vice-principals?



NAPOLEON BONAPARTE

NAPOLEON BONAPARTE (1769-1821)

While Napoleon is chiefly known in history as one of the world's greatest military geniuses, he exercised his master mind with financial, political, and legal questions. The great reconstruction period in French history dates from the Consulate rather than from the Revolution.

Following the Treaty of Amiens, Napoleon devoted himself to reconstruction work: (a) the restoration of the Church, (b) the University, (c) the judicial system, (d) the codification of all the laws, (e) the bank of France, (f) the Legion of Honor.

While under arrest in 1794 he studied the civil law and on his release said, "I was saturated with Justinian and the decisions of the Roman legislators." As a result of his activities, the herculean task of codifying the laws was completed.

The *Code Napoleon* is known to all civilized nations of the earth.

CHAPTER XVI

PARTNERSHIP

- 124. INTRODUCTION
- 125. OBJECT
- 126. DEFINITION
- 127. OTHER DEFINITIONS
- 128. FOR WHAT PURPOSE CREATED
- 129. WHO MAY BE PARTNERS
 - 1. Express
 - 2. Implied
- 130. DIVISION OF PROFITS
- 131. RECAPITULATION
- 132. QUESTIONS

124. Introduction. By way of introducing this subject, it will not be amiss to recall to mind the formation of contracts in general and their object, also the fact that the subject just completed, that of agency, lends an aid in the forming of contracts that from necessity and convenience were referred to the agent for consummation. In the present subject the main features of the two previous subjects will be found, that is, partnership agreements include contractual relationship of general contracts and the representation of agency.

In partnership each partner is an accredited agent for all. The act of one partner, within the scope of the business, is the act of all.

125. Object. The object of partnership agreements is two-fold: first, the association or combination whereby larger capital and more varied experience are brought together; second,

the forming of contracts by the representations of a partner acting as an agent.

The breadth and scope of human activities have assumed such vast proportions that frequently the capital and activity of a single individual would not produce sufficiently large returns, and as a consequence several parties unite in the one endeavor; for example, several investing money, others manufacturing experience, and others managerial ability. The combination makes possible greater undertakings and a proportionate lessening of operating expenses, thereby securing greater profits. It also provides for an economical division of labor, whereby the chief directing is done by an interested party, a partner, who has the contracting power and authority of an agent.

126. Definition. Partnership is a legal relationship whereby several parties are united, each investing and contributing to the success of the undertaking for the purpose of carrying on some industrial enterprise, the profits of which are to be shared by the partners.

The term co-partnership is frequently used interchangeably with partnership. The parties to the agreement are known as co-partners, or partners, and taken together they constitute a firm or house.

127. Other Definitions. "We define partnership as the combination by two or more persons of capital or labor or skill, for the purpose of conducting business for their common benefit."

"Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit."

"Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a community of profits thereof between them."

128. For What Purpose Created. The partnership relationship may be created for the purpose of carrying on any lawful business. While partnership contracts were once confined

to trade and commerce merely, at the present time partnerships are formed for all conceivable enterprises—mining, farming, stock raising, lumbering, and professional occupations, such as medicine, law, dentistry, and the like.

If the relationship is for the purpose of furthering some unlawful purpose, the contracts so made are unenforceable. The rules laid down in the chapter on contracts relative to illegal undertakings are applicable here.

129. Who May Be Partners. The general rules of contracts prevail. Anyone capable of entering into a contract may, by agreement or by implication, become liable as a partner. Persons whose contracts are void or voidable are protected to the same extent in partnership.

1. *Express.* The relationship of partnership is one of contract or agreement and may be either express or implied, written or verbal. An express agreement is the result of a mutually expressed desire to be bound.

2. *Implied.* The contract of partnership may be established by implication, for the purpose of protecting or enforcing the rights of a partner or for the purpose of enabling a third person to enforce a contract. The former has in view the contract, the latter the protection of the third party, which is a question of public policy.

In order to establish a partnership contract, the third party must show, first, that the supposed partner has knowledge of the fact that he was being held out as a partner, and that it was with his consent; and second, that the third party so endeavoring to establish the relationship exercised reasonable care and prudence and relied on such conditions in good faith.

"If one is held out as a partner and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do under the circumstances to assert and manifest his refusal, and thereby prevent innocent parties from being misled."

130. Division of Profits. The contract of partnership is primarily formed for the purpose of producing profits. To obtain

the result of trade in association, there must be a division or sharing of profits; however, there need not be a sharing of losses. In the early adjustments of partnership questions, in determining whether the relationship of partners existed, the question, How are the profits to be shared? was a vital one. Profit is the distributive part after creditors have been paid in full.

There must be community of principals sharing the joint profits. This excludes all agents or servants who may receive a share of the profits in lieu of wages.

“In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good as between themselves, is ineffectual as against third persons.”

131. RECAPITULATION

Partnership is a contract relation in which each partner is an agent for all.

✓ The object of partnership is to combine capital and experience.

✓ It is created for the purpose of carrying on any lawful business.

The general rules of contracts apply as to competency to form the partnership contract.

✓ The agreement may be either express, implied, or partly both.

✓ The partners must share in the profits, and as principals.

✓ The law presumes an equality of division, but the division may be in any proportion.

132. QUESTIONS

What is a partnership? Its object? Who may be partners? Define partnership by express terms. By implied terms. Give examples. What has profit to do with establishing partnership?

CHAPTER XVII

ARTICLES OF PARTNERSHIP

133. INCIDENTS

134. ARTICLES

1. The Firm Name
2. Capital
3. Losses and Gains
4. Partnership Property
5. Property Bought or Acquired in Name of Partner
6. Good Will
7. Notice

135. RECAPITULATION

136. QUESTIONS

133. Incidents. The law attaches no significance to the manner by which the contract of partnership is formed, no formality being essential. Yet the contract is so important, so full of possibilities for subsequent disputes, that no part should be omitted or detail be considered too slight to be recorded.

134. Articles. The contract of partnership is usually a written contract enumerating the important parts and known as articles of partnership. These articles should include, generally, the following: Firm name, length of time, amount to be invested by each, the duties of each, the place of business, the object, the restrictions, and proportion or the division of profits. The articles should be signed by each partner. Some of these articles will be discussed; some need no attention.

1. *The Firm Name.* No special rule can be laid down in this matter. The usual firm name includes the names, or part or some of the names, of the members of the firm. A firm name is not necessary—it is a matter of convenience. Each name may be

signed separately or the name of one may be sufficient. The use of the term "& Co." is forbidden in some states unless it actually represents partners. The common law recognizes no objection. The name may be distinctive of the business.

There is no restriction in regard to a firm name except that "one firm is not at liberty to mislead the public by so using the name of another firm as to pass off themselves or their goods for that other or for the goods of that other."

The law will protect a firm in the use of its name. There is no law, however, that a number of persons may not use their own names as a firm name in carrying on a certain business, even though their name may be the same as some other firm. This, however, must be in good faith and not used as a deceit.

2. *Capital.* The capital of a firm is the total of the several investments made by the partners. It is customary for the amount and nature of each partner's investment to be shown in the agreement. If not so shown the investments are understood to be equal.

Subject to agreement, the investment of each need not be money, but property of any kind. Instead, skill and experience may be invested. This does not increase the appreciable capital. In fact, simply the use of property may be invested, the title remaining with the partner.

The capital is firm property, yet it does not follow that upon dissolution it is to be divided equally. It is returned as invested before the sharing of gains.

3. *Losses and Gains.* If no agreement is recorded, the law presumes an equal distribution. A distribution of profit must be had to constitute a partnership, and the profits must be shared by the partners as principals. It is not essential that losses be shared by the partners. To receive a share of the profits in lieu of a salary does not create a partnership.

4. *Partnership Property.* This may consist in the property originally invested by the partners and subsequently acquired by the partnership. The title is in the partnership, each partner hav-

ing a proportionate and undivided share in the whole, there being generally no limit to the amount of capital a firm may have in personal or real property.

5. *Property Bought or Acquired in Name of Partner.* When one partner takes title to property purchased with partnership funds in his individual name, he holds it in trust for all members of the firm. This is but an application of the rule that the principal is entitled to the benefits of the contracts made by his agents. The title to personal property may be held in the name of the firm. All papers relating to business interests, such as notes, drafts, checks, chattel mortgages, may be given or held in the firm's name. They may be held by a partner for the benefit of the firm.

6. *Good-Will.* "The good-will of a trade is nothing more than the probability that the old customers will resort to the 'old place' to do business." It is the reputation and character of a business. "It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that have grown up through a long period and been prompted by large expenditures of money. And it may be worth all the money it has cost and a great deal more; but it is, after all, nothing more than a hope grounded upon a probability."

The good-will is a resource and passes with a sale of the business, but does not necessarily pass with the sale of the stock. Upon dissolution of a firm, the good-will is to be disposed of as an asset.

7. *Notice.* In the usual course of the business, notice that comes to the attention of a partner is notice to the partnership.

135. RECAPITULATION

The law requires no formality in establishing the contract of partnership.

✓ The partnership contract, if written, should be specific as to terms.

✓ The common law knows no restriction as to the name a firm may use.

✓ The capital is the investment—money, goods, experience, etc.

✓ There must be a sharing of gains as principals.

The firm property may be held in the name of the firm or of a partner.

Good-will is capitalized reputation.

Notice to a partner is notice to the firm.

136. QUESTIONS

What are some of the things that should be included in a written contract of partnership? What is the rule in regard to evidence relating to written contracts? (See Contracts).

What may be invested as capital? What is the rule as to the distribution of losses and gains? What is good-will? Give examples of business houses in your knowledge whose good-will would be valuable.

CHAPTER XVIII.

POWERS AND LIABILITIES

- 137. POWERS
- 138. LIABILITY OF PARTNERS
- 139. TRADING AND NON-TRADING COMPANIES
- 140. SCOPE OF BUSINESS
- 141. KINDS OF PARTNERS
 - 1. Real, or Ostensible Partner
 - 2. Nominal Partner
 - 3. Dormant Partner
 - 4. Limited Partner
- 142. LIMITED PARTNERSHIP
- 143. RECAPITULATION
- 144. QUESTIONS

137. Powers. The formation of partnership relationship creates the relationship of principal and agent. Each one is a principal and at the same time an accredited agent for all. The general rules relating to powers and liabilities as laid down in the chapter on Agency apply here. As between themselves, the parties may agree to any legal distribution of powers and duties, a division of duties being permissible; and a restriction of the right to act for the firm is binding between the members of the firm but inoperative when the rights of an innocent third party intervene.

When no powers are agreed upon, by implication the usual ones are understood. Third persons must exercise reasonable care and diligence to determine the existence and nature of a partnership. They are bound to take notice of all known facts or those that might be ascertained.

The partnership may be confined to a single venture or to a special time. "Where a partnership is limited to a particular trade or business, one partner cannot bind his co-partner by any contract not relating to such a trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from circumstances connected with the business of the firm."

138. Liability of Partners. Each partner is at once an agent and a principal. He is liable personally as well as collectively on all contracts made either by himself or by his associates. His private property may be taken from him by due process of law to satisfy the creditors of the firm if there are not enough partnership assets. He stands as a guarantor of debts owed by the firm. If in a final settlement there is not enough partnership property to satisfy creditors' claims in full, and recourse is had to individual property, the partner advancing more than his share has a right to demand contribution from his partners.

139. Trading and Non-Trading Companies. There is a distinction of importance relating to the powers of partners engaged in a general buying and selling business and those not so engaged. "The test of the character of the partnership is buying and selling. If it buys and sells, it is commercial or trading. If it does not buy or sell, it is one of employment or occupation." The law recognizes greater and more varied powers of partners in the former than in the latter.

In the case of the A B C Co., a mercantile house, great latitude of commercial activity must be granted in favor of the partners, while if this were an association of physicians little latitude would be recognized. In the former contracting is the business, while in the latter it is but an incident. In the one, profits are produced by buying and selling; in the other, through the ability to perform an act.

140. Scope of Business. Within the scope of the business is included the carrying out of all acts expressly provided

for and all those acts that are incident and necessary to the full development of the partnership business. While the scope of the business may be clearly defined by the articles, strangers are guided largely by those acts of the partners that have been carried out with the public. By this means the scope may be enlarged so as to include a line of operation not contemplated at the time of the formation of the partnership. The partners' powers are enlarged by express or implied consent of the partners, and the contracts so formed are binding.

141. Kind of Partners. Partners are classified as real, or ostensible; nominal; dormant, or silent; and limited.

1. *Real, or Ostensible Partner* is one who is held out to the public as a general partner. He is active in the management of the business, and shares in its losses and gains.

2. *Nominal Partner* is a partner in name only, that is, he merely loans the use of his name and the benefit of his credit to the firm. He is not a participant in profit and losses.

3. *Dormant, or Silent Partner* is a partner not known to the public. He has an interest in the business, but third parties have no knowledge of this. If he becomes known as a partner he at once becomes liable for debts of the firm.

4. *Limited Partner.* Statutory enactments have in many states provided a way whereby a person may be interested in a business as a partner and yet escape a part of the liability of the general partner. If he complies with the statute, his liability is limited to the amount of his investment. If he does not heed the injunction of the statute, he becomes a general partner liable for all debts. Not all the partners may be limited. Some of the provisions usually named in the statute are: One or more general partners with one or more special partners. Special partners' names must not be used in the firm name, investment must be paid in, and the word "limited" must be used with the firm name. The agreement must be in writing and, in general, recorded and published.

142. Limited Partnership. Under the statutory enactments, several states allow the formation of a limited partnership in which the liability of each partner is limited to the amount of his investment. It is needless to say that the statutory requirements must be carefully followed.

143. RECAPITULATION

- Each partner is the accredited agent for the firm.
- Each partner is jointly and jointly and severally liable for the debts of the firm.
- The scope of the business is largely determined by the impression conveyed to the third party.
- An ostensible partner is a real partner.
- A nominal partner is one in name only.
- A dormant partner is one not known to the public.
- A limited partner is one whose liability is limited.
- A limited partnership is one of statutory provisions.

144. QUESTIONS

What is the relationship of partners? What is the extent of the powers of a partner? What is the liability of partners?

What is the distinction between trading and non-trading companies? What is the meaning of "scope of business"? Define the different kinds of partners. What is a limited partnership? What is the distinction between a limited partnership and a limited partner?

CHAPTER XIX.

DISSOLUTION AND ITS CONSEQUENCES

145. DISSOLUTION

1. By Original Agreement
2. By Subsequent Agreement
3. By Operation of Law
 - (a) Death
 - (b) Bankruptcy of Partner
 - (c) Insanity of Partner
4. By Decree of Court
5. Grounds for Decree
6. Notice

146. EFFECT OF DISSOLUTION

1. Powers That Cease
2. Powers That Remain
3. Powers Created

147. SPECIAL AGREEMENTS

148. LIEN

149. FINAL ACCOUNTING

150. RECAPITULATION

151. QUESTIONS

152. DECISIONS OF THE COURTS

153. HYPOTHETICAL PROBLEMS

154. CONSTRUCTION WORK

155. SEARCH QUESTIONS

145. Dissolution. The contractual relationship of partners is established by mutual consent. It is but a natural consequence that the parties to this agreement should be able to mutually agree to a termination of the relationship. A dissolution may be brought about: (1) By the original agreement; (2) by

subsequent agreement; (3) by operation of law; (4) by decree of law.

1. *By Original Agreement.* Frequently the parties at the time of formulating the articles of partnership provide both the time and manner of dissolving the partnership agreement. If no attempt is made to wind up the affairs of the firm at the appointed time, it is a partnership at will. Any partner thereafter at any time may work a dissolution.

When stipulations are entered into by partners providing for the continuation of the partnership in case of death or the sale of an interest by a partner, the result is to provide a way to bridge the interval between the old firm and the new one.

2. *By Subsequent Agreement.* By mutual agreement the partnership may be dissolved at any time irrespective of the provisions of the articles. If a partner attempts to work a dissolution before the agreed time he may be enjoined from doing so.

3. *By Operation of Law.* Events may happen making the continuance of the partnership inexpedient or even impossible, and as a consequence a dissolution is effected; e. g., by death, bankruptcy of partner, marriage of a woman partner, or insanity of a partner.

(a) *Death.* In this event the united action of the partners is at an end. The remaining partners should not be compelled to continue. The share of the deceased partner passes to his representatives, who have no rights as partners. The old partnership must terminate irrespective of any agreement previously made.

(b) *Bankruptcy of Partner.* The bankruptcy of a partner is generally sufficient to work a dissolution of the partnership. The share of the partner may be decreed to pass to the creditors of the failing partner. If a partner disposes of his interest, a dissolution is effected. He may, under a proper showing, be enjoined from disposing of his interest.

(c) *Insanity of Partner.* While insanity of a partner is not sufficient in itself to bring about a dissolution, it may furnish ample grounds to justify the granting of a decree of dissolution.

4. *By Decree of Court.* Under decree of court not only may a dissolution be ordered, but the partnership agreement be declared to be void and of no force from the beginning. Such a decree will not be entered if the partnership is for no definite time or the agreed time has expired.

5. *Grounds for Decree.* Equity will in many cases decree a dissolution of the partnership: (1) Where it is evident that the venture can never be a success, or where there is little probability of success because of erroneous foundation. (2) Where fraud was used in bringing about the partnership. (3) When one of the partners has become mentally incapacitated, as from insanity. (4) Where the misconduct of a partner is of such a notorious character that further prosecution of the partnership is inexpedient or impossible. The misconduct, however, must not be of the one praying for relief.

6. *Notice.* Through business relationship the general public is aware of the existence of the partnership, and if a dissolution is effected they are to be apprised of this fact. The dissolution is to terminate the liabilities of partners. Any notice that reaches the public is sufficient. However, it is customary to send written notice to all with whom dealings have been had and to publish a general notice in the newspapers of the locality. He who deals with the partnership does so at his peril.

The effect of notice to third parties is to effectually defeat the making of new contracts for the firm by any partner. The absence of notice leaves the power in a partner of entering into new contracts with third parties, and binds the withdrawing partners as well as those who remain.

146. *Effect of Dissolution.* The first effect is to terminate the partnership agreement, annulling certain powers, allowing some to remain in force, and to create new powers.

1. *Powers That Cease.* The powers that are for the purpose of conducting the partnership business terminate; no new contracts are to be made. The life of the business is at an end.

2. *Powers That Remain.* These are principally settlement rights, to collect debts due the firm, to sell firm assets, and to pay firm indebtedness and make the final distribution of assets to partners according to the articles of agreement.

3. *Powers Created.* When a dissolution of a partnership occurs through operation of law, the partners become interested as tenants in common.

147. **Special Agreements.** The partners are at liberty to make any legal agreements as to the distribution of the partnership effects, or agreements as to the remaining partners carrying on the business, and these will be enforced as far as the partners themselves are concerned.

They cannot change their own liability to third persons by such agreements. The third person loses no rights by such agreements.

148. **Lien.** Each partner has a lien on the partnership property to the extent of demanding that the proceeds of its sale shall be used in paying the indebtedness of the firm and that the property shall be distributed in accordance with the provisions of the partnership agreement. In the absence of such an agreement the law presumes an equal distribution.

149. **Final Accounting.** Following a dissolution, an accounting becomes necessary. In case of the solvency of the firm the process is simple: to reduce assets to cash, pay outside liabilities, divide and distribute profits, and withdraw investments. In accounting for profits all must be included even though made by an especial effort of a partner. If a partner buys goods for the firm at very lowest figures and receives a donation from the seller, he must account for it to the firm. Equity exacts this duty from all agents.

The adjusting of partners' advances and contributions as between themselves must not interfere with the settling of outside claims. An eminent jurist says: "In adjusting the accounts of partners, losses ought to be paid first out of assets, excluding capital, next out of capital, and lastly by having recourse to the

partners individually; and the assets of the partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying to each partner ratably what is due from the firm to him for advances, as distinguished from capital.

"3. In paying to each partner ratably what is due from the firm to him in respect of capital.

"4. The ultimate residue, if any, will then be divided as profit between the partners in equal shares, unless the contrary be shown."

150. RECAPITULATION

The dissolution of a partnership is subject to the will of the partners.

The death of a partner works a dissolution of a partnership.

The bankruptcy or insanity of a partner generally works a dissolution of a partnership.

A court of equity may decree the dissolution of a partnership.

To prevent the accruing of liability, a retiring partner must notify third parties.

On dissolution operating powers terminate and winding up powers remain.

Partners may make special agreements affecting the business, but this will not affect relations to third parties.

Partners are given the right of lien to protect their interests.

Dissolution of partnership calls for an accounting.

151. QUESTIONS

In what ways may a dissolution be effected? Explain each. Name the grounds for a decree of dissolution. Explain notice in its relation to third parties and partner.

On dissolution what powers cease? What ones remain? What is the standing in relationship to third parties that special agreements have between partners? Explain partners' right of lien.

Enumerate steps, on dissolution of partnership, of disposition of property. Refer to the statutes of your state for information relating to restricting or limiting the liability of partners; limited partnership; and restriction as to name of partnership.

152. DECISIONS BY THE COURTS

1. In *A v. B*, 67 Md. 53, A, a minor, paid into a firm a sum of money as consideration for being admitted a partner. He remained such for one year, then withdrew, as the business was not successful. No fraud was used in inducing him to enter the firm. Questions: the right to withdraw and the right to demand the return of money paid for admission to the firm, since he had enjoyed the benefits of the partnership. The questions were decided in the affirmative.

2. In *C v. H*, 104 Cal. 302, where persons entering into a business enterprise contract to do what in law is necessary to constitute a partnership, they are a partnership though they did not expressly intend to create such relationship.

3. In *P v. S*, 22 Mo. 177, an agreement between two houses to share commissions on sales of goods forwarded by one to the other does not constitute a partnership.

4. In *D v. B*, 6 Phila. 176, an agreement by one to serve another at a salary or compensation in proportion to, or to be computed by, the profits of the business, will not render them partners, either between themselves or as regards third persons, unless such was their intention.

5. In *B v. P*, 3 Ill. App., so far as two partners are themselves concerned, there can be no partnership without the assent of both. One's unaccepted proposition is insufficient.

6. In *C v. F*, 16 Ohio 166, a person cannot become a member of a partnership without the consent of all the members.

7. In *S v. B*, 19 W. Va. 274, if a person contracts with one member of a firm to share the profits and losses of that member, this does not make him a partner in the firm, the other members not having agreed thereto.

8. In *A v. L*, 1 La. Ann. 457, a partnership may be contracted to take effect at a future time or on certain conditions.

9. In *M v. H*, 77 Ky., an agreement by two firms to buy hogs and pack pork one season on joint account, constitutes them a partnership as to that adventure. It did not consolidate the firms.

10. In *A v. S*, 82 Mo. 76, an agreement between A and B whereby A agreed to buy cattle at his own expense and to furnish about 40 acres of land for one year, and B to furnish balance of pasture for the same time and pay A \$100, the profits after allowing A expenses for feeding to be equally divided, does not constitute them partners.

11. In *C v. D*, 14 N. C. 89, an agreement between the owner of a vessel and the captain that each should pay certain expenses and divide the freight, with power to the captain to invest it on joint account, constitutes a partnership.

12. In *S v. S*, 2 Ga. 18, partners may modify, alter, or dissolve the partnership contract, as between themselves, either in whole or in part, provided they do not violate any principle of law or public policy.

13. In *M v. K*, 114 Ill. 574, the purchase of a partner's share of the firm profits does not render the purchaser liable on firm contracts. Also a partnership between individuals and a second partnership constitutes all members of the second partnership members of the first.

14. In *McS v. M*, 50 N. Y. 166, one who has been engaged in carrying on business in the name and ostensibly as a member of a firm, cannot set up as against his own acts the non-existence of the firm by reason of a want of consent in one of its members.

15. In *St. J v. H*, 81 Ind. 350, when plaintiff was induced through fraud to invest and become a partner, and thereafter is possessed of this knowledge and fails to repudiate the agreement and ratifies, he cannot subsequently rescind.

16. In *I v. B*, 27 Iowa, 131, the purchase of a threshing machine by two persons, to be used by them in common, in payment for which they execute to the vendor their joint note, renders them joint owners, but not partners.

17. In *M v. G*, 54 Mich. 9, where a person agrees to buy land, saw the timber and ship it to another, who agrees to pay him the cost of the timber and a stated price per thousand, sell the lumber and divide the net profits or losses, there is no partnership in unshipped lumber.

18. In *B v. H*, 35 N. Y. 405, in order to constitute a partnership, each person must have an interest in the profits as a principal trader. A mere reception of a portion of the profits is insufficient.

19. In *C v. B*, 101 Cal. 500, evidence that four persons associated themselves together to divide the profits arising from the carrying on of a certain business, is sufficient to support a finding of a partnership between them.

20. In *T v. H*, 16 Colo. 447, a contract for the sale of goods, which provides that the goods shall be charged for at reasonable prices and that the purchasers shall have a credit of one-half the profits, does not establish a partnership between the sellers and the purchasers.

21. In *G v. N*, 24 Mass. 282, where a person advances money to the owners of a vessel and cargo, who promise to pay to him a share of the proceeds of the voyage in proportion to the sum advanced by him, he does not thereby become a partner.

22. In *H v. H*, Fed. Case No. 6279, where A agreed to run B's factories, and B agreed to allow him one-fourth of the profits the first year and one-third for each succeeding year as the reward of his services, this did not make the parties partners inter sese.

23. In *S v. W*, 66 N. Y. 424, to establish a liability against a party, as a partner, for the acts of others, it must be made to appear that a partnership was formed by express agreement, or that there was an authorization in advance and a consent to be bound by such acts as a partner, or a ratification of the acts after performance, with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created.

24. In *C v. M*, 127 Pa. 442, an agreement between two persons by which they are to divide the profits of a business between them "share and share alike," constitutes a partnership as to third persons, whatever may be the arrangement between themselves.

25. In *S v. P*, 16 Kans. 209, a party who, without any interest in the property, is by agreement to receive as compensation for his services, and only as compensation therefor, a certain proportion of the profits, and is neither held out to the world as a partner nor, through the negligence of the owner, permitted to hold himself out as a partner, is not a partner either as to the owner or third persons.

26. In *M v. H*, 41 W. Va. 39, where a person, by his own conduct, conversation, admissions, or otherwise, allows himself to be held out as a member of a prospective firm, and thereby a third party is induced to credit such firm, such person, to the extent of liability thus incurred, is estopped from denying the existence of such firm; though one may not be held as a partner for such acts or statements by one who lends credit not knowing of such acts or statements at time credit is given. But one who is in fact a partner, although not known as such by one who gives credit, is held as a partner.

27. In *P v. R*, 31 Ga., it is not necessary that a firm name should be agreed on in a partnership, and in *G v. F*, 82 Mo., the mere change in the name of a firm does not affect its rights and liabilities.

28. In *P v. D*, 25 Vt. 624, if one or more of the members of a firm divert the funds of the firm to other uses, such partner is liable, in making up the account, to be charged with all the detriment thus suffered by the firm.

29. In *F v. L*, 34 Ky. 24, where the business of a firm was conducted by one partner alone, it was his duty to keep an account of all partnership transactions.

30. In *C v. P*, 16 Ill. App. 446, a partner is not entitled to compensation for services without express agreement, though the services rendered by the respective partners have been unequal.

31. In *S v. N*, 53 Mich. 421, reasonable expense incurred by a member of a firm, with or without the consent of the rest, in exploring premises leased to the firm for mining purposes, will be allowed on a partnership accounting.

32. In *M v. C*, 13 La., Ann. 519, a partner is bound to indemnify his co-partners for any loss to the firm occasioned by an act of his done in violation of the contract of partnership, unless his partners, by their acts or assent, ratify or confirm his acts which occasioned the loss.

33. In *E v. C*, 59 N. C. 261, where one of a co-partnership, by any means, gets a fund belonging to the firm, he is not at liberty to appropriate it to his own exclusive benefit, but must share it with his co-partners.

34. In *B v. D*, 48 Md. 247, a partner cannot sue his co-partner to recover an indebtedness of the latter to the former, growing out of the partnership transactions, until the affairs of the firm have been closed and its debts have been paid.

35. In *McA v. C*, 45 Nebr. 582, where a partnership business was settled according to the books kept by one partner, on discovering errors in the books, in that such partner failed to enter receipts of partnership money by himself, the other partner may sue at law to recover the damage which was caused thereby in the settlement.

36. In *B v. M*, 68 Ky. 672, in favor of third persons, each partner is presumed to be authorized to act as agent for the others, and the firm is bound by his acts relative to their business, whatever may be the private arrangement between them or their responsibilities to each other for a violation thereof.

37. In *P v. G*, 26 Ill. 405, firm debts must be paid out of firm property and private debts out of private property; and no resort can be had by the one class of creditors to the fund belonging to the other until their own fund has been first exhausted. Where there are no joint funds, private creditors may share equally with joint ones in the estate of a deceased partner, and if there be a surplus of joint funds, private creditors may resort to that.

38. In *G v. C* (D. C.), 16 Fed. 316, so long as a firm is solvent, all its members assenting, the individual debts of the parties may be paid out of the firm assets; but, if the firm is insolvent at the time a transfer of the firm property to make such payment is made, it is fraudulent and void as to existing creditors of the firm.

39. In *McD v. M*, 5 La. 403, one who is a partner when goods are sold by, though not when they were consigned to, a firm, is liable to the consignor.

40. In *S v. P*, 32 N. Y. 501, members of a partnership who have transferred their interests therein to others, with the consent of the remaining partners, stand in the relation of sureties for such partners to the partnership creditors.

41. In *H v. W*, 14 La., Ann. 348, where a party purchases an interest in a commercial house, entitling him "to an equal undivided one-third interest and ownership, and to all stock of merchandise, bills re-

ceivable, and debts in book accounts on hand, due or owing to the firm on a given day, over and above the payment of the liabilities of said firm," he is responsible for the debts of the house existing at the time of purchase.

42. In *A v. W*, 26 Ark. 135, the surviving members of the co-partnership have the legal title to the firm property, and the right to dispose of its assets, only for the purpose of closing the business up, not of continuing it.

43. In *D v. M*, 55 N. J. 427, where articles of partnership do not provide for the manner in which the affairs of the partnership shall be wound up on dissolution, the partnership will continue with all its incidents of interest, power, and obligations, so far as is necessary for the purpose of winding up the concerns of the partnership and no farther.

44. In *G v. R*, 28 Ala. 289, a relinquishment of one ostensible partner to another of all his interest in the partnership, does not discharge him from liability as a partner to a third person who afterwards deals with the company without notice of such relinquishment.

153. HYPOTHETICAL PROBLEMS

1. A, B and C are members of a partnership, investing as follows: A cash \$10,000, B real estate valued at \$8,000, and C his experience as a manufacturer. The business produces a profit of \$10,000 at the end of the first year. Nothing is said as to the division of profits. Discuss rights of partners relative to profit.

2. Same as in 1, but A withdrew during the year \$2,000, B \$1,500, and C \$1,200, thus leaving a profit of but \$5,300. There is no provision in the agreement as to partners' withdrawals. Discuss rights of partners as to profits.

3. D, E and F are partners, each investing cash \$9,000. They indorse accommodation paper amounting to \$50,000 which they are obliged to meet. The firm assets are as listed, and their individual resources are as follows: D resources \$50,000 and liabilities \$14,000; E resources \$20,000 and liabilities \$12,000; F no resources or liabilities. Discuss settlement.

4. Later, F, of problem 3, inherits \$50,000. Discuss contributory rights of D and E.

5. G and H are partners, making equal investments. G is sick the greater part of the year and H claims pay for the extra work he performed. Discuss rights of partners.

6. I and J are partners in the grain business. I is in the grain country as buyer, shipping the grain to J for sale. I makes a purchase at less than market price, thereby saving \$200. This sum he retains, reporting the purchase at market prices. Later, I learns of this. Discuss rights.

7. K and L are partners. They dissolve partnership after paying all known debts. Later a claim against the partnership for \$100 is presented to K, who pays on advice of counsel. Discuss rights.

8. M and N are partners who fail with liabilities of \$30,000 in excess of resources. Their individual properties and debts are as follows: M \$100,000 resources and \$20,000 debts; N \$5,000 resources and \$6,000 debts. The creditors proceed against the partners individually and seize N's resources. Discuss settlement.

9. O and P are partners, and agree as to the amount of credit several of their customers are to be allowed. Subsequent to this, and unknown to P, O allows several customers to exceed the agreed limit. As a result of this the firm loses \$5,000. Discuss the rights.

10. Q and R are partners for an exact term of years. Does the partnership terminate at that time, or must the partners proceed to dissolve? May they continue without regard to the time limit?

11. S, T and U are partners. In the agreement there is a clause stating that on the death of a member the two remaining ones may purchase the deceased interests for \$5,000. A death occurs, and the purchase is made. Is this a new firm, or the old firm as per the agreement?

12. V, W and X are partners, X being a limited partner. The firm fails in business with \$8,000 liabilities in excess of resources. Each partner has private resources in excess of the firm liability. Discuss rights of creditors.

154. CONSTRUCTION WORK

Draw up the following: Articles of Partnership.

Made and entered into—4 partners—date

1st. Carrying on business—describe it—term of years—allow for a partner's withdrawal from business.

2nd. The name of the firm shall be location of

3rd. What each shall contribute

4th. Amount that each may withdraw when

5th. Gains and losses to be divided.

6th. What each shall do.....

7th. Agreement in carrying on business.

8th. The keeping of accounts—double entry—statements from time to time—money receipts and payments—how made.

9th. What shall not be done—indorsing paper—guaranteeing accounts—lending money.

10th. At end of each year, inventories—closing accounts—balance sheet—transferring loss and gains share to individual accounts.

11th. How to adjust differences.

12th. Properly signed and attested by three witnesses.

155. SEARCH QUESTIONS

Is there a limited partnership act? How many general partners may there be? How many limited partners? What powers have limited partners as to conduct of business with outsiders? How does the limited partner preserve his limited liability? What if he does not observe the regulations as prescribed by statute? Has he the right to demand an accounting? What general provision is there providing for the continuation of the partnership in case of the death of a general partner? May a married woman on her own account enter into a contract of partnership?

CHAPTER XX.

NOTES AND BILLS

- 156. INTRODUCTION
- 157. WHAT MONEY IS
- 158. WHAT CREDIT IS
- 159. ASSIGNABILITY
- 160. THE LAW MERCHANT
- 161. WHAT NEGOTIABLE PAPERS ARE
- 162. QUESTIONS

156. Introduction. Commodities raised or produced in one community are in part exchanged for different commodities raised or produced in other communities. The producer of grain desires machinery, articles of clothing, and a reserve for a possible failure of crops. The manufacturer desires to exchange his product for food and clothing and a reserve. The exchanging of one commodity for another is called barter. Trade by means of barter is unsatisfactory for many reasons. It is cumbersome, difficult to adjust as to value, and does not offer the best opportunity to store and keep for subsequent use.

The exchange of commodities by barter is subject to great fluctuations of exchange values. A medium that is constant in value affords greater and safer opportunities for exchange. The two greatest mediums so far discovered to facilitate exchange, are money and credit.

157. What Money Is. Money is the common denominator of values. It is the one element with which the values of other commodities may be compared and measured. It may be fur-

ther defined as "any material that by agreement serves as a common medium of exchange and measure of value in trade." Gold and silver, because of great stability in value, have been selected as the best circulating medium of exchange.

158. What Credit Is. Since the money of a country actively engaged in commerce is generally greatly inadequate when compared with the volume of business done, credit comes to the aid of money and assists in the exchange of goods. Credit is based on confidence; and in giving credit to the buyer, several forms of credit promises are given as, for example, notes, drafts, checks, and oral promises, which are spoken of as buying or selling on account. In the case of the promissory note, the confidence of the seller is extended to the buyer, who gives his note payable at a certain time in the future. The seller may in turn discount the note at the bank. Both parties are thereby accommodated—the buyer gets time for payment, the seller gets the money or credit with the banker, and the banker receives the discount for his services.

The use of the draft may be illustrated by the following: A western merchant ships wheat to the east to be sold, and buys a bill of goods from some eastern manufacturer. Without the aid of the draft, the money would be sent to the West to settle the first sale and would immediately be sent to the East in satisfaction of the eastern purchase. Loss of the use of the money, loss of time, and risk in sending the money would be the result. Instead of doing this, the western merchant draws a draft on the grain account in the East and sends it to the manufacturer, who collects the money from the eastern grain-dealer. These various papers are called commercial or negotiable papers.

159. Assignability. This is a right recognized by the common law; it is the right to transfer or assign a right or claim held against another. For example: A sells and delivers certain chattels to B for \$100, for which B is to pay A in 30 days. First, this is a contract partly executed. The payment remains to complete the contract. The law recognizes A's claim as a chase in

action; it is a right that may be disposed of by sale or assignment. A sells this claim against B to C for a certain sum. C acquires only the rights possessed by A at the time of the sale. C should now notify B of his acquired rights and direct him to pay to him, C, the amount then due. C has protected his rights, which we will now examine. Suppose that at the time A sold this claim, B held a debt claim against A amounting to \$40.00; this is a set-off against the rights of C. The latter can only secure \$60.00 from B; he must look to A for the balance. Thus we say that the assignee acquires only the rights possessed by the assignor at the time of transfer and that to keep those rights intact he must notify the debtor of his acquired rights. A payment made by the debtor before notice but after sale, is a good defense against the assignee.

The common law recognizes the right of the holder to transfer his *choses in action* to another, but insists that the buyer shall acquire only the right possessed by his seller. He assumes all the risk of uncertainty in the claim and must sue in the name of his assignor. A set-off may be found to exist in favor of the debtor, and it is good against the new purchaser although he did not know of its existence, or, in fact, have means of knowing. This is the law of assignment.

160. The Law Merchant. This term originated in the usage of the merchants of Europe, and has been gradually extended throughout the commercial world. It recognizes rights not known at the common law, chief among which are grace, negotiability, and presumption of consideration. Grace applies only to negotiable paper, and is additional time granted the payer in which to meet his obligations, generally three days. Days of grace have been abolished in a large number of the states. Negotiability is the element that is in reality the life of negotiable paper; it includes the right whereby the purchaser, under certain conditions, is enabled to collect the amount the instrument calls for, irrespective of defenses between the original parties. A set-off does not follow and attach as in assignment. A presumption

of consideration exists in favor of all negotiable paper unless this presumption is overcome by evidence. The presumption is that the paper was given for value.

To recapitulate: The assignee acquires the rights of the assignor subject to existing claims or defenses. The purchaser of negotiable paper acquires full title, and the right to collect the full amount, notwithstanding that counter-claims and defenses may exist between the original parties. The transfer defeats existing claims or defenses. This is the law of negotiability.

161. What Negotiable Papers Are. All papers issued for the purpose of assisting in the exchange of money, and which bear certain necessary elements, are negotiable; for example, notes, drafts, checks, certificates of deposit, etc.

The Law Merchant rules, together with the common law, were introduced into this country by the early settlers from England. The law relating to Negotiable Instruments is largely the result of custom and statutory enactments from time to time. The many courts having jurisdiction in this country, through their decisions and interpretations, have produced many conflicting conclusions. Many states have added to the confusion by enacting special statutes. As a consequence, there have been presented many suggestions for legislation by the various state legislatures harmonizing and unifying the laws on the subject. In 1882 the English Parliament passed the "English Bills of Exchange Act." This codified the laws and settled conflicting decisions. Such a law was first passed in this country by New York in 1895. It has been passed since by a large majority of the states. This law does not abrogate the laws of notes and bills, but settles conflicting opinions and unifies the application of the law merchant. This text is in accordance with the negotiable instrument act.

Note.—This subject is considered so important a part of commercial law that it is thought proper to omit the recapitulation, thereby indicating to the student that a review should include the complete text on Negotiable Paper.

162. QUESTIONS

What is exchange? Why desirable?

What is money? Name some of the articles that have been used as money. What is used chiefly for this purpose now? Why?

What is credit? On what is it based? How does credit help money in transacting business?

What is assignability? What is negotiability? Give an example to illustrate assignability and negotiability.

Define the law merchant. What three rights did the law merchant add to the common law?

Name the usual negotiable instruments. Give a sketch of the development of the law relating to negotiable paper.

CHAPTER XXI

ELEMENTS OF NEGOTIABLE PAPER

163. INTRODUCTION

164. ELEMENTS

1. Contract in Writing
2. Absolute Promise or Order
3. Certainty as to Time
4. Certainty as to Amount
5. Payable in Money
6. Specification of Parties
7. Negotiable Words
8. Delivery

165. SOME NON-ESSENTIALS

1. Date
2. Value Received
3. Days of Grace

166. LIABILITY

167. QUESTIONS

168. DECISIONS BY THE COURTS

163. Introduction. The common law of England recognized no such rules as are found in the law merchant which found its birth among the merchants on the continent of Europe, but the advantages of these rules were found to be wise and needful for a commercial nation. Their adoption was hedged about by the requirements of certain characteristics which are known as the elements of negotiable paper. Negotiable instruments are contracts of a special character.

164. Elements. 1. *Contract in Writing.* All negotiable contracts must be in writing and signed. While an oral promise under common law might be a valid contract, it could not be

considered negotiable under the law merchant. The writing may be with ink or in pencil on any ordinary writing material.

2. *Absolute Promise or Order.* The promise contained in the note, or the order on a third person in a draft, must be an unconditional promise or order to pay money; any condition would make the contract non-negotiable and subject to the rules of the common law. Courtesy of language, as "please pay," will not affect the negotiability; it is no less an order or promise to pay. In a note payable on or before a certain date, the paper is payable absolutely on that date, but may be paid earlier. If a note is made payable in the alternative, it is non-negotiable, and a note payable after the arrival of a particular steamer, or other uncertain event, is a conditional promise, and therefore non-negotiable. A promise to pay on the death of a certain person is considered an absolute promise to pay. If made payable out of a certain fund the instrument is non-negotiable, as the promise is conditional. This is because of the uncertainty of the particular fund.

3. *Certainty As to Time.* Negotiable instruments are based on certainties, and time is no exception. If no time is specified, the instrument is payable on demand. Time is generally specified as "after date" or "after sight"; other words of the same import may be used. The word "month" means a calendar month; a note payable one month after Aug. 30 is due on Sept. 30, while a note payable 30 days after Aug. 30 is due on Sept. 29. Notes drawn on Dec. 28-29-30-31 and each reading "two months after date," would all fall due on Feb. 28, unless a leap year, when the first would fall due on the 28th and the rest on the 29th.

4. *Certainty As to Amount.* The amount to be paid must be certain, and stated in the instrument. If the amount cannot be definitely determined from a reading of the instrument, it is non-negotiable. The amount is generally written once in words and once in figures; but this is merely a precautionary measure. The amount in words controls. If the note contains a provision for the payment of interest, it does not affect its negotiability, for that is a determinable amount. It may also contain the follow-

ing provisions: payable in installments, default of one making balance due and payable; with exchange; with the addition of collection; attorney's fees and cost when not paid at maturity.

5. *Payable in Money.* It has always been held that negotiable paper must be payable in money or an equivalent thereof. A note payable in merchandise is not a negotiable instrument, unless made so by statutory enactment.

6. *Specification of Parties.* There must be no uncertainty in regard to the parties to a negotiable instrument. Not only must it be shown who is the payer, but also it must be made certain to whom payment is to be made. The giver of the instrument must sign; the receiver may be indicated as in "bearer." The capacity of the parties to the contract is the same as in common law. Parties are classed as original and subsequent. The first class are the ones who made the original contract; the second includes all those who may at a subsequent time receive the contract. The first are familiar with the making of the contract; the second know of the contract as it stands completed; they probably know nothing of the real consideration, but they are bound by the contract as expressed. While the signatures are generally at the end of the contract, it is not necessarily so.

7. *Negotiable Words.* This element is the chief one that originated with the custom of merchants. Under the common law, ~~chooses in action~~ ^{things in action} were transferable only; that is, the buyer acquired the rights of the seller and no more. The law merchant goes farther and allows to the buyer a perfect title. In order to make a bill negotiable, the intent must be clearly shown. This is done by making use of the words, "order or bearer," or any word or words having the same import. Without these words the instrument is non-negotiable, and the holder takes it subject to defenses existing at the time of the transfer, or until notice of transfer is made. When the word "order" is used, the name of the payee must also appear. If the word "bearer" is used, the payee's name may or may not appear. A paper reading "pay to the order of A" is the same as "pay A or order." One reading "pay to the bearer, A" is not negotiable, unless so made by statute.

8. *Delivery.* The last step necessary to put a negotiable instrument in circulation, or to make it effective, is to deliver it; and until this is done it has no validity. As long as the paper is in the hands of an agent, it may be recalled. The same is true of a paper still in the hands of postal authorities, for they are held to be agents of the maker.

If an instrument is delivered in trust to a third party to be delivered subject to a condition, it is called an escrow. Until the condition is complied with, no legal delivery has been made as between the original parties; but if title is acquired by a subsequent party in good faith, a complete delivery has been made. If a blank instrument properly signed is issued with authority to fill out, no further delivery is necessary. The holder may fill out the blank, even increasing the amount, and put the paper in circulation and the maker is bound to pay.

165. Some Non-Essentials. 1. *Date.* The date is not necessary; it should be given, however; otherwise recourse must be had to parol evidence to fix the date, as the maturity of paper is in most cases determined by the date of the instrument. Papers may be post-dated as well as ante-dated. The presumption, however, is that the date of the instrument is the date of delivery.

2. *Value Received.* This term is not an essential to negotiable instruments, but is generally used. It originated with the introduction of notes, a creature of the common law. The term has not been eliminated, although notes were by English statute made to possess the elements of negotiability, thereby carrying presumption of consideration.

3. *Days of Grace.* Grace is an extension of three days to the payer in which to make payment. It is an element of the law merchant, but it is not necessary, since by contract it may be excluded. Many of the states have by statute abolished days of grace. Originally, demand was made on the last day of the contract, the payer being allowed extra time, called grace, if necessary. In time this was always demanded, and the time of making the demand changed to the last day of grace. If the last day of

grace is a Sunday or a holiday, the demand should be made a day earlier. When grace is not allowed, and the paper falls due on Sunday or a legal holiday, the demand is made on the first day following a Sunday or legal holiday; also since Saturday is, in banking, generally a half holiday, paper maturing on that day is carried over to the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

166. Liability. Parties to negotiable instruments are classed as original and subsequent. The first are those who were parties to the original contract, and the second are those who afterward acquired a title. Liability is classified as absolute, or primary, and as conditional, or secondary. Absolute liability admits of no uncertainty; it is such liability as that assumed by the maker of a note or acceptor of a draft who, in substance, says, "I will pay." Conditional liability depends on some condition and is clothed in effect as follows: "If A does not pay, I will." This the undertaking of a drawer of a check, or draft, or the indorser of any negotiable instrument.

167. QUESTIONS

What are the elements of negotiable paper? Explain each of the following: In writing, absolute promise, certainty of time, certainty of amount, payable in money, specification of parties, negotiable words, delivery, delivery in escrow.

Is a note legal when written with a pencil? Name and explain the non-essentials. Classify the liability of parties to negotiable paper.

A note reads payable to A on his marriage. Is it negotiable? Why? A note reads payable on the death of a certain person, is it negotiable? Why? A note reads payable out of a certain fund. Is it negotiable? Give your reasons. If the payment is chargeable to a particular fund or account? What is the difference between making a note payable out of a particular fund or charging the payment to a particular account or fund?

168. DECISIONS BY THE COURTS

1. In *K v. H*, 13 Ill. 604, the latter sued the former on the following statement:

“Castleton, April 27, 1844.

Due Henry D. Kelley fifty-three dollars when he is twenty-one years old with interest. David Kelley.”

On the back was this indorsement:

“Rockton, May the 21st, 1848.

Signed the within, payable to Moses Hemingway.

Henry Kelley.”

It was proved that the payee became of age in August, 1849. If the terms of an instrument leave it uncertain whether the money will ever become payable, it can not be considered a promissory note. A promise in writing to pay a sum of money when a person shall marry, or when a ship shall return, is not a promissory note, since it is not certain that the person will ever marry, or that the ship will ever return. In all such cases the promise is to pay on a contingency that may never happen. So in this case Henry D. Kelley, the payee, might never reach twenty-one years of age. The fact that he did makes no difference. The contingency was not sure to happen, and therefore the instrument in its origin lacked one of the essential elements of a promissory note, and consequently was not negotiable. The plaintiff did not have legal title to the instrument. The suit should have been brought in the name of the payee. R/ The time when a note or bill is to be paid must be certain.

2. In the case of *H v. P*, the plaintiffs sued as assignees on a promissory note, “payable at New York, in New York funds, or their equivalent.” The court said: “Whether it meant the funds of the State generally, or of the city of New York is not clear. The face of the note is indefinite, is susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute.”

It is not a note, in the language of the decisions, payable in money. “Funds” may embrace stocks, banknotes, specie, and every description of currency used in commercial transactions. To be a note, it must be an unconditional written promise or order to pay a certain sum of money.

3. In *B v. G*, 13 Mass. 158, the writing was as follows:

“Boston, 15th May, 1810.

Good for one hundred and twenty-six dollars on demand.

Gilma & Hoyt.”

The question here was whether the plaintiff could recover without showing any title to the promise declared upon, or any relation or connection with the debtor, from which a presumption might be drawn that

the promise declared on was made to him. It is not a negotiable promissory note. If it were, and had the name of the promisee on the back, the possession of it would be sufficient prima facie evidence of the plaintiff's title. It is not a note payable to bearer, which would be sufficient evidence of a promise to pay the holder, unless suspicion was thrown upon his title by the maker. It is not, then, any contract known in law which from its own force constitutes a promise to whomsoever shall produce it. The payee must be named or definitely indicated.

4. In *B v. the B and D bank*, 6 Hill (N. Y.) 443, the indorsement was made with a lead pencil, and in the figures, "1. 2. 8.," no name being written. Evidence was given that these figures were in Brown's handwriting and that he meant to be bound as an indorser. It was held that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself. Any written emblem whereby a party signifies his intention to be bound will constitute a signature.

5. In *D v. E*, 34 Me. 96, suit was brought by the indorsee against the makers of a note payable to the Protection Insurance Company or order, for "\$271.25, with such additional premium as may arise on policy No. 50, issued at the Calais Agency." The court held that this was a simple contract for an unascertained and indefinite amount and was therefore not negotiable. It was also held that the plaintiff could not, by abandoning the indefinite portion, thereby render an instrument negotiable, which, in its origin, was non-negotiable. The sum to be paid must be fixed and certain.

6. In the case of *S v. S*, 28 N. H. 419, the instrument in question was as follows:

"Strathom, March 28, 1846.

Due to Sophie Gordon, widow, ten thousand dollars, to be paid as wanted for her support. If no part is wanted, it is not to be paid.

Stephen Scammore."

The court held that the foregoing writing had none of the qualities of a promissory note; that it was an admission of a special agreement to pay Mrs. Gordon such sum as should be wanted for her support, to the amount of \$10,000. It was not evidence of any debt to any amount, since if no part of the money was wanted for her support, no part of it was to be paid. It was merely contingent whether anything would be payable. Every note must contain a specific promise expressed or implied.

CHAPTER XXII

NOTES

- 169. INTRODUCTION
- 170. DEFINITION
- 171. LIABILITY
- 172. PARTIES
- 173. KINDS OF NOTES
- 174. GENERAL PROVISIONS
- 175. ACCOMMODATION NOTES
- 176. JUDGMENT NOTES
- 177. COLLATERAL NOTES
- 178. MATURITY
- 179. INTEREST
- 180. WHERE PAYABLE
- 181. QUESTIONS
- 182. DECISIONS BY THE COURTS

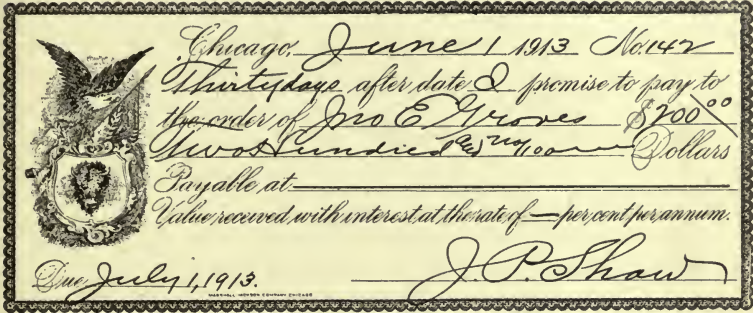
169. **Introduction.** This is one of the early forms of negotiable paper, made so by statute. By reading the note one sees that it is an absolute promise to pay.

170. **Definition.** A note is written evidence of a debt, coupled with an unqualified promise to pay.

In the first illustration J. P. Shaw is maker of the note and Jno. E. Groves is payee. It is not an interest-bearing contract, but will begin to draw the legal rate at maturity, if not paid at that time. It is the duty of Shaw to tender payment to the holder, but the holder may demand payment at the maker's place of business. Groves, the payee, may sell and transfer his interest in the agreement by writing his name on the back of the paper. It is a

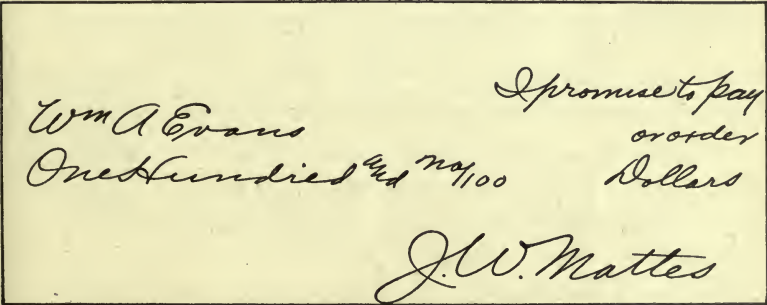
negotiable promissory note, as it contains all the necessary elements. Point out the necessary elements and indicate the non-essential terms used.

INDIVIDUAL NOTE



The following contains all the elements of negotiable paper. Name and point out each one. How would you establish the maturity of the note? Does it draw interest? Where is it payable?

ELEMENTS OF A NOTE



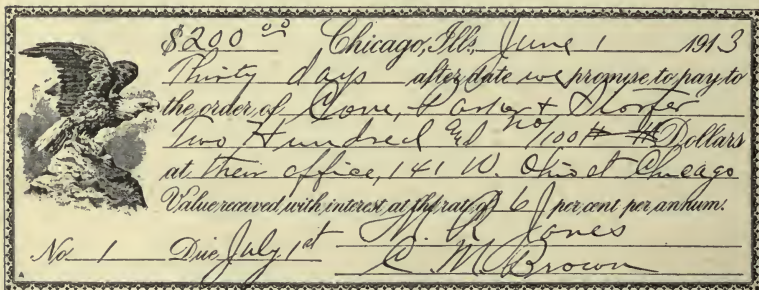
171. **Liability.** The maker of a promissory note is absolutely liable for its payment. Failure to demand payment at maturity will not excuse him. There is no liability on the part of payee; however, if he indorses and transfers the paper he becomes conditionally liable. That is, in substance, he says, "If the maker does not pay at maturity, I will."

172. Parties. The capacity of all parties to negotiable paper is the same as that of parties generally in contracts. The original parties to a note are two in number: the one, the *maker*, who issues the obligation and promises to pay; the other, the *payee*, to whom the payment is to be made.

173. Kinds of Notes. An individual note has but one maker. A joint note has several makers; as, "we promise to pay," or "we jointly," or "we jointly but not severally," would be examples of joint notes; so also, would one reading, "I promise to pay," signed by several makers, be a joint note. The makers agree to be held together.

A joint and several note is one signed by two or more parties as makers, generally reading "we or either of us promise to pay,"

JOINT NOTE



or "we jointly and severally promise to pay." The holder may proceed against any one or all to enforce collection. Joint notes are by statute law of most States made joint and several to facilitate collection.

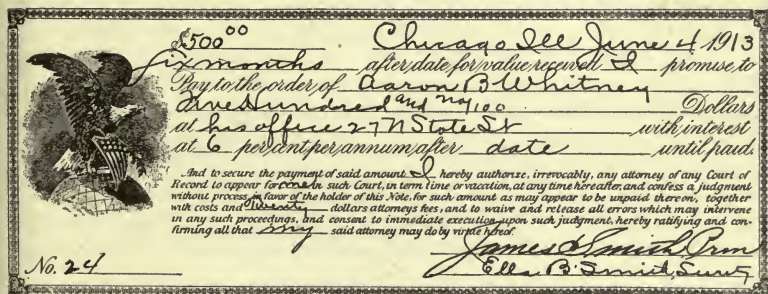
174. General Provisions. The law merchant carries presumption of consideration, therefore, no statement relative to value is necessary. The use of the words "value received" is of long standing, but they may be omitted without affecting the paper. The date is not an essential element, but as the maturity is usually computed from the date of the paper, it is convenient. If omitted it may be supplied by parol evidence. Notes bear in-

terest only when so stated. If "with interest" is included, the legal rate is meant. Any rate not contrary to law may be agreed upon. If the paper is silent as to the place of payment, it is the duty of the debtor, the maker, to seek the creditor and tender payment. If tender is not made at maturity, interest will begin.

175. Accommodation Notes. A may desire to accommodate B by the loan of a certain sum of money but may not have the ready funds. His credit at the bank however, may be good, so he gives B his note for which no value is given. B now presents the note at the bank for discount and is accommodated with the use of the money. He is supposed to pay the note when it falls due; if he does not, the maker is liable for its payment. Had B held the note until due, he could not collect, for there was no consideration. A partner cannot bind the firm by an accommodation indorsement. An accommodation instrument in the hands of the accommodated party may be recalled by the maker at any time before the instrument is put in circulation.

176. Judgment Notes. A judgment note is an ordinary note to which is added a power of attorney enabling the holder

JUDGMENT NOTE



\$500.00 *Chicago Ill June 4 1913*
Six months after date for value received I promise to
 Pay to the order of *Aaron B. Whitney*
Five hundred and no/100 Dollars
 at his office *27 N State St* with interest
 at *6 percent per annum* after date until paid.
 And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for ~~me~~ *me* such Court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and ~~disbursements~~ *disbursements* dollars attorneys fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that ~~my~~ *my* said attorney may do by virtue hereof.
No. 24 *James C. Smith Esq*
Ellis B. Smith, Esq.

to have judgment entered without the initiatory steps of serving a summons and having a trial. To the power of attorney is generally added waiver of homestead exemption, and, commonly, a stipulated sum as attorney's fees is named. The advantages of such a note are all in favor of the holder. The judgment clause facilitates collection. Judgment notes are negotiable instruments.

177. **Collateral Notes.** This is also an ordinary note to which is added a certificate stating that the maker has deposited with the payee certain collateral securities, together with certain rights as incident thereto. It is a quick and safe way to realize ready money. For example, A desires to borrow from a bank five thousand dollars, and to that end deposits with the bank, say, five or six United States bonds of one thousand dollars each

COLLATERAL NOTE

\$1000 ⁰⁰	Dayton O May 16 1909
Three months	after date I promise to pay to the order of
Bankers Trust Co	at their office in 100 Erie St
One thousand and no/100	Dollars,
for value received, with interest at the rate of 6 per cent per annum, after maturity until paid.	
C. D. Frederick	
I have transferred and delivered to said Bankers Trust Co as Collateral security, for the payment of this and of any other liabilities of the undersigned to said payee, due or to become due, or that may hereafter be contracted, the following property, value of which is Twelve hundred fifty and no/100 Dollars:	
viz.: Five shares First mortgage Guaranty and Trust Co	
One bond (\$500) Hamilton Club Chicago Ill	
And the undersigned hereby give the said payee and assigns authority to sell the said property, or any part thereof, or any substitutes therefor, and all additions thereto, on the maturity of the above note, or any time thereafter, or before, in the event of the said security depreciating in value, at any public or private sale, without advertising the same, or demanding payment or giving notice, with the right to said payee and assigns themselves to be the purchasers, when sale is made at any brokers' board or public sale. And after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee or assigns shall elect, returning the overplus to the undersigned; and in case the proceeds of the sale of said property shall not cover the principal, interest and expenses, the undersigned engages to pay the deficiency forthwith after such sale, with legal interest.	
C. D. Frederick	

as security, together with his own note for the amount borrowed. The bank is abundantly secured and A is not obliged to sell his bonds to realize the necessary money. The certificate usually gives the holder the right to sell the securities in case the principal obligation is not paid. It is a negotiable instrument.

178. **Maturity.** The maturity of a note is usually a certain time from the date of the note. The maturity may be stated in lieu of time: as, "On Nov. 1, 1904, I promise to pay." If the paper reads "On or before" a certain time, it is optional with the maker to make prior payment, but it becomes absolutely due at the designated time of maturity. If no time is stated, the note is due and payable on demand.

179. **Interest.** A note is a written contract and is affected only by the terms clearly stated. If no mention is made of interest, it is non-interest bearing. In order to draw interest, it must be so stated; as "with interest at 6%," "with interest," "with use." All notes draw interest after maturity whether so stated or not. Interest would begin at that date even though the note reads "without interest"

180. **Where Payable.** The note given at the beginning of the chapter is non-interest bearing. It is the duty of Shaw to and the holder and tender payment. If he fails to do so, interest at the legal rate commences. If a place of payment is named, the tender must be made at that place.

181. QUESTIONS

What is a note? Name and define the parties. What is the difference between a "joint" and a "joint and several" note? What are the general provisions relating to notes? Explain by illustration an accommodation note.

What features added to an ordinary note will make it a judgment note? What is a collateral note, and explain how used? How is the maturity of a note determined? When does a note draw interest?

182. DECISIONS BY THE COURTS

1. In *S v. C*, 254 Ill. 185, a note, executed without consideration, under an agreement that the maker should never be required to pay, not enforceable by the payee.

2. In *C v. O*, 151 S. W. 403 (Ky.), a note given for money advanced to pay candidate's election expenses under an agreement that it

would be void if the payee was employed as attorney by a person appointed by such candidate, held void because based on an illegal consideration.

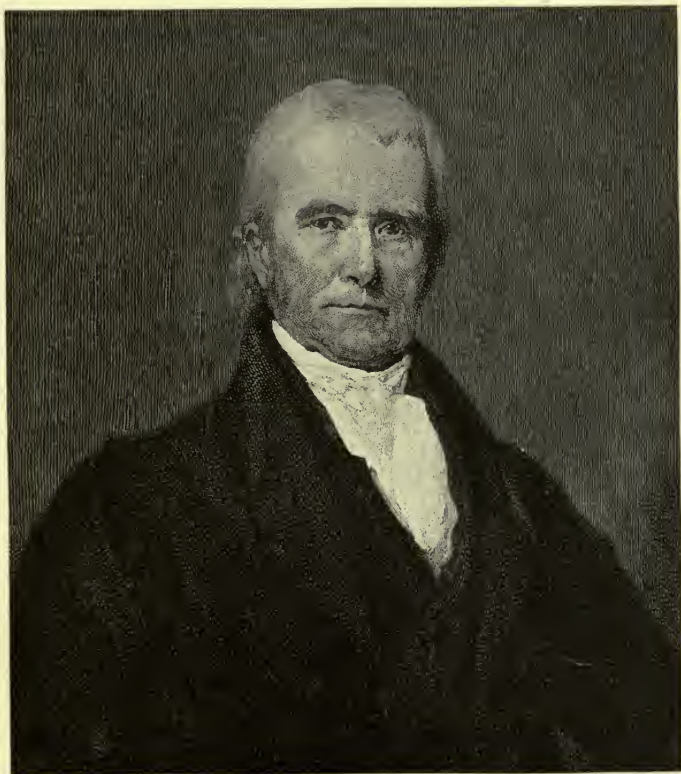
3. In *A v. R*, 126 P 1048 (Ill.), where it is shown that a note was procured by fraud, and was without consideration, the burden shifts to plaintiff to show that the note was purchased in due course for a valuable consideration, and without notice of fraud.

4. In *D v. H*, 60 So. 303 (Ala.), a written instrument, whereby the maker promised to pay a certain sum in money at his option before his death or to be collected from his estate thereafter, is not invalid as a testamentary instrument or a promise to make a future gift, but is a good promissory note.

5. In *Y v. H*, 99 N. E. 327 (Mass.), a note, as between the parties, takes effect only on its unconditional delivery.

6. In *W v. E*, 75 S. E. 989 (Ga.), on the sale of a negotiable note by a trustee in bankruptcy after its indorsement by the payee, it is not necessary, in order to pass title, for the trustee to indorse the note; mere delivery being sufficient.

In *A v. S*, 138 N. Y. S 237 (N. Y.), the rule that a bank undertaking to collect a note for a depositor must accept in payment only legal money, is subject to a contrary custom which is known to depositors or so common as to raise the presumption of knowledge. A bank, receiving a note for collection for a depositor, and accepting an acceptance of another bank at which the maker had sufficient funds, must, to escape liability, prove it to be the established custom, known to depositors, to accept in payment such acceptance.



JOHN MARSHALL

JOHN MARSHALL (1755-1835)

Soldier, statesman, and one of America's greatest chief justices of the Supreme Court.

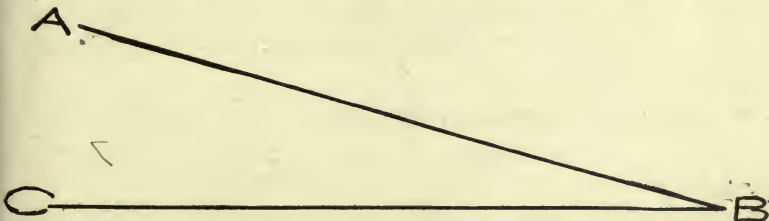
Marshall was appointed to the Supreme Court at a time when the relationship of the written constitution to legislative enactments was being considered by both the strict and loose constructionists. It was during his incumbency as Chief Justice that interpretations by the Supreme Court through its decisions definitely determined the status of the Constitution. "The Constitution since its adoption, owes more to him than to any one single mind for its true interpretation and vindication." In the celebrated case of *Marbury versus Madison*, Marshall clearly and logically sets right the question of conflict between the Constitution and a legislative enactment: "If a law be in opposition to the Constitution, the court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law." Upon this decision rests the authority for the annulment of twenty-one acts of Congress and some two hundred State laws as in conflict with the national Constitution.

CHAPTER XXIII

DRAFTS

- 183. INTRODUCTION
- 184. DEFINITION
- 185. THEORY OF DRAFT
- 186. ACCEPTANCE
 - 1. Kind of Acceptance
 - 2. What an Acceptance Acknowledges
 - 3. Quasi Acceptance
 - 4. Acceptance for Honor
- 187. LIABILITY OF PARTIES
- 188. SET OF EXCHANGES
- 189. TIME
- 190. NON-ACCEPTANCE OR NON-PAYMENT
- 191. PROTEST
- 192. NOTICE
- 193. QUESTIONS
- 194. DECISIONS BY THE COURTS

183. **Introduction.** A draft is the oldest of the many kinds of negotiable instruments, having been used by the Hanseatic

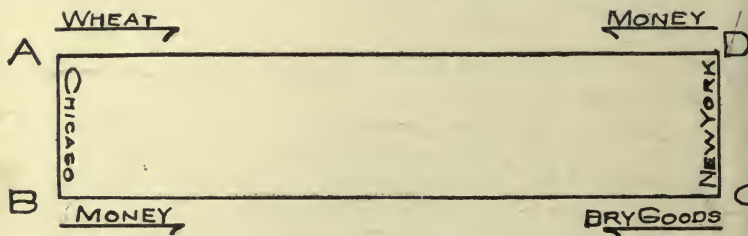


League in making payments for goods. For example, A, of one city, owes B, of another, who in turn owes C, of the former city.

In order to save the necessity of transmitting the money between these two places, B directs A to pay the amount due him to C and thus cancels all the indebtedness between these parties.

Again, for example, there is no money due in Chicago from New York or the reverse. The following deals then take place:

A, of Chicago, ships 100,000 bushels of wheat at \$1.00 a bushel to D, of New York. B, of Chicago, buys \$100,000 worth of dry



goods from C, of New York. As the deal now stands there is \$100,000 due to Chicago from New York and the same amount due from Chicago to New York. By means of a bill of exchange the banks of the two cities are able to settle the accounts without the use of money. B buys at the bank a draft on New York which he mails to C, who sells it to his banker. D buys at the bank a draft on Chicago which he mails to A, who sells it to his banker, and the accounts are again all in balance without the use of any money.

184. Definition. A draft is an order by one person on a second person to pay a certain sum of money to a third person. These parties are respectively known as drawer, drawee, and payee. The draft is frequently designated a Bill of Exchange or simply Exchange.

185. Theory of Draft. The theory of the draft is that the drawer has funds belonging to him in the hands of the drawee, and therefore has the right to direct payment.

Drafts are issued payable at sight or a certain time after sight, and are known as sight or time paper. They are also called foreign or inland. Foreign, if the parties are residing in different

countries; inland, if they live in the same country or state. A draft drawn in Springfield, Illinois, and payable in Pittsburgh, Pennsylvania, is a foreign instrument.

SIGHT DRAFT OR BILL OF EXCHANGE

NO PROTEST
Take this off before presenting

See O' March 1913 No 15

At sight Pay to the order of

W. F. Sloum \$500.00

Five Hundred Dollars

Value received and charge to account of

To M. Kamson, M. Phepps

Phoenix, Ariz.

MARSHALL, LATHROP COMPANY CHICAGO

186. **Acceptance.** If a draft reads "payable after sight" it is not due and payable until the expiration of the time specified. "At sight" means after seen by the drawee, not after date of issue. Therefore the draft must be presented to the drawee to

AN ACCEPTED DRAFT

Salem Or. Apr. 6, 1913 No 86

At thirty days sight Pay to the order of

Brown Smith & Co. \$600.00

Six Hundred Dollars

Value received and charge to account of

To R. W. Wallace, C. Brown & Co.

Berres, Calif.

B

MARSHALL, LATHROP COMPANY CHICAGO

determine his willingness to pay, and if he refuses, the draft is said to be dishonored. If he is willing to pay when due, he signifies his willingness to do so by writing his acceptance across the face of the draft. He now is held to the same promise as that of the maker of a note. He is under no obligation to accept even

though he owes the drawer. After acceptance he is absolutely bound to pay.

1. *Kind of Acceptance.* The payee or holder of a draft, who presents it to the drawee for acceptance, has a right to an unconditional acceptance. In fact, if he should permit the drawee to give him a qualified acceptance, the act would release the drawer from all liability. To condition the draft in regard to amount, a change in time of payment, or a change in the place of payment, would be sufficient to release the drawer from his usual conditional liabilities; as, "accepted provided I have received sufficient funds"; "accepted provided proceeds of sales of shipment are great enough."

2. *What an Acceptance Acknowledges.* An acceptance once made acknowledges the genuineness of the drawer's signature, the capacity of the drawer to make the draft, his existence, and his authority to draw for the amount. Also, if the draft was to the payee's order, that the payee is competent to indorse.

3. *Quasi Acceptance.* There are several somewhat irregular acceptances or conditions that may amount to an acceptance. If the drawee holds the draft for an unreasonable length of time, or refuses to give it up, he is deemed an acceptor. The drawee may desire to attach a conditional acceptance, as when he accepts conditioned upon receipt of sufficient funds. The holder may refuse such acceptance. If he receives it he thereby releases those previously liable as they understood that the drawee would give an absolute acceptance. An acceptance may be given directing the holder to some third party for payment. This is not a usual acceptance in this country. The acceptance is called "in case of need," and is given after the paper has been dishonored.

Again, an acceptance may be in writing, as in a letter which properly describes the papers. It is an undertaking or promise to accept a draft.

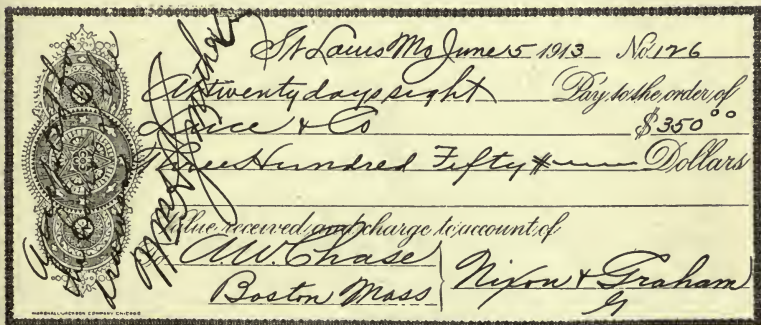
4. *Acceptance for Honor.* If a bill is presented to the drawee for acceptance and it is dishonored through his refusal to accept it, a friend of some previous party, generally the drawer, may offer to save the credit of the bill by accepting the paper for

the honor of the drawer or some other particular party. This is done by writing across the face of the draft "accepted for the honor of" and signing it. This acceptance is sometimes designated an acceptance *supra protest*, the holder is not obliged to accept this kind of an acceptance but may proceed to collect against those who were conditionally liable.

A draft with an acceptance for honor matures from the date of dishonor rather than from the date of acceptance. There may be several acceptances for honor of the same paper.

The theory of this acceptance is that it gives the drawer an opportunity to take care of the bill at maturity by placing funds

AN ACCEPTANCE FOR "HONOR"



in the hands of the drawee, or otherwise providing for the payment of the paper to be presented. The liability of an acceptor for honor differs from that of an ordinary acceptor in that he is only conditionally liable. When the draft matures it must be presented to the drawee for payment, and if again dishonored is again protested. This time the acceptor for honor is notified of the dishonor after which he becomes absolutely liable, like all parties conditionally liable.

187. Liability of Parties. The drawer presumably has funds belonging to him with the drawee and desires to collect by transferring a claim for the amount named to the payee. The drawer is conditionally liable; the drawee assumes no liability until he signifies his willingness by paying or accepting the draft.

After acceptance his liability is absolute, the same as the maker of a note. The payee must present the draft within a reasonable time. He may transfer his right either before or after acceptance and assume the liability of an indorser..

188. Set of Exchanges. One of the means adopted to insure prompt presentment and payment was to draw the draft in sets, duplicates or triplicates, and to send each by a different route, the first one received to be acted upon, the others to be void. Each draft properly describes the accompanying parts so that no misunderstanding can occur that may lead to the belief

FIRST BILL OF A SET OF EXCHANGE

<p>Exchange for £ 85-4-7 5/4 Sixty</p>	<p>Chicago, June 14, 1913</p>
<p>Days after sight of this FIRST of Exchange, second of same tenor and date unpaid, Pay to the order of <u>Cone, Parker & Co. Inc.</u> Eighty-five pounds, 4/4 — Sterling Value received and charge the same to account of To <u>J. Gloss & Co., Ltd.</u> <u>32 Middleborough St.</u> <u>London</u></p>	
<p>08436</p>	<p>L. B. Armstrong</p>

that each is a complete instrument. The present transportation is so sure and prompt that sets of exchanges are not as frequently used as in the days of the stage coach and sailing ships.

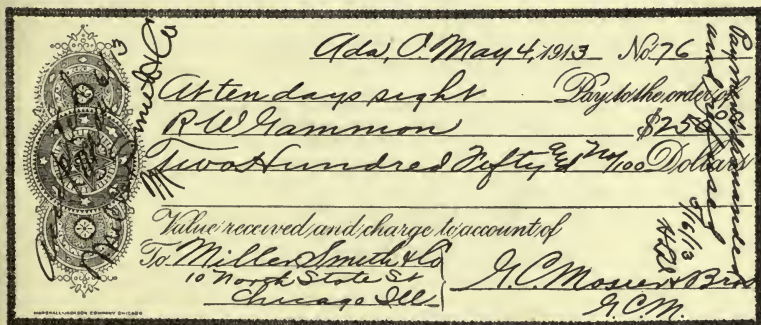
In the above form the part in parenthesis is a description of the other parts of the set. The paper may be negotiable as an ordinary draft, but care must be exercised, as a fraudulently disposed person might negotiate each of the parts to several innocent parties.

189. Time. The holder of an unaccepted draft must observe the following: How, when, where, and to whom must pre-

sentment for payment or acceptance be made. First, the presentment must be by an exhibit of the paper to the drawee or his agent, with demand for payment or acceptance. Second, the paper must be presented within a reasonable time. What is a reasonable time depends on circumstances. This has reference both to the time of day and to the length of time the paper may be kept. Third, the drawer by giving the address of the drawee must be satisfied with presentment at that place. Reasonable effort must be made to find the drawee.

190. Non-Acceptance or Non-Payment. When the drawee refuses to accept a time draft, pay a sight draft, or pay an accepted draft, it is said to be dishonored. The parties absolutely liable continue so liable until they are excused by the due cancellation of the instrument; but to fix the liability of those secondarily liable, certain steps must be taken to change their liability from secondary or conditional, to primary or absolute, in order to enable the holder to take advantage of the provisions of the law of merchants; i. e., the holder protests against the non-acceptance or non-payment.

“ACCEPTED DRAFT” PROTESTED



191. Protest. This is a formal declaration made in order to furnish the parties secondarily liable with the evidence of the dishonor of the particular paper. This evidence is furnished by an official known as a Notary Public. All foreign papers, notes,

CERTIFICATE OF PROTEST.

ENDORSEMENTS	COPY OF BILL OR NOTE
Pay to the Order of Lee McCalla R. W. Gammon Pay A. A. Brewer or order Lee McCalla	Ada, O., May 4, 1913 At ten days sight pay to the order of R. W. Gammon \$250.00 Two Hundred Fifty Dollars Value received and charge to account of To Miller, Smith & Co. G. C. Mosier & Bros. 10 N. State St., G. C. W. Chicago, Ill.

STATE OF IllinoisCook

COUNTY

} ss.

Be it known, That on this sixteenth day of May in the year of our Lord
one thousand nine hundred and thirteen, I W. H. Kinney
a Notary Public, duly commissioned and sworn, and residing in Chicago
in said County and State, at the request of A. A. Brewer

_____ went with the original instrument, which is above attached, to the office of
Miller, Smith & Co., 10 N. State St., Chicago, Ill.,
and presented it to the person in charge, and demanded payment thereon, which was refused:
The firm has failed and is in the hands of a receiver

Whereupon I, the said Notary, at the request of the aforesaid, did Protest and by these presents do Solemnly Protest
as well against the makers of said instrument, the endorsers thereof, as all others whom it doth or may concern, for ex-
change, re-exchange, and all costs, charges, damages and interest already incurred by reason of the non-payment of said
instrument, And I, the said Notary, do hereby certify, that due notice thereof was put in the Post Office at Chicago,

Illinois, as follows:Notice for G. C. Mosier & Bros., Ada, Ohio" " R. W. Gammon, 15 N. State St., Chicago, Ill." " Lee McCalla, South Chicago, Ill.

" "

" "

" "

" "

The above named places being the reputed places of residence respectively of the persons to whom such Notice was
directed. In Testimony Whereof, I have hereunto set my hand and affixed my official seal this day and year above written.

W. H. Kinney
Notary Public

checks, drafts, etc., that are dishonored must be protested if it is intended to hold those who are secondarily liable. It is not necessary to protest inland paper unless so required by statute. The notary personally presents the paper, and notes thereon the dishonor, and later makes out the official statement, called a protest, a specimen of which is shown on the opposite page.

192. **Notice.** All parties conditionally liable must be notified in case of dishonor of paper. The holder may notify in case of inland paper, but in case of foreign paper the notice is sent by the notary making the protest. The following is a proper notice:

NOTICE OF PROTEST OF NOTE

STATE OF ILLINOIS,

COUNTY OF Cook } SS.

Chicago, Ill., May 16 1913.

SIR:

A draft for \$ 250.00

Dated May 6, 1913

Payable May 16, 1913

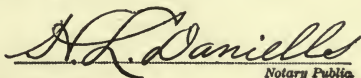
Signed by Miller, Smith & Co.

Endorsed by R. W. Gammon, and Lee McCalla

Drawn by G. C. Mosier & Bros.

Being this day due and unpaid, has been by me PROTESTED for non-payment, and I hereby notify you that the payment thereof has been duly demanded, and that the holders look to you for payment, damages, interest and costs.

Done at the request of A. A. Brewer
the holder.


Notary Public.

To G. C. Mosier & Bros.

Ada, Ohio

193. QUESTIONS

What is a draft? Illustrate its use with three parties. With four parties.

What is the theory of a draft? What is an acceptance? When necessary and when not?

Name the parties to a draft and state the liability of each.

What is an acceptance for honor? Compare the liability of such an acceptance with that of a regular acceptor.

Illustrate several somewhat irregular acceptances. May an acceptance be on a separate sheet of paper? May it be given before the draft is drawn?

Explain a set of exchange. Why not so frequently used now? What care must be exercised in their use?

Explain holder's duties as to how, when, and where to present for acceptance.

What is non-acceptance or non-payment? And what must be done by the holder?

What is a protest? And when necessary? What is notice? And how given?

194. DECISIONS BY THE COURTS

1. In *H v. B*, 75 S. E. 696 (S. C.), a bank held liable for negligence of its correspondent in the collection of a draft. A stipulation on a deposit slip held not to exempt a bank from liability for its negligence in the collection of a draft or waive the rights of the depositor under the law merchant.

2. A bank sued for negligence in the collection of a draft held to have the burden of showing the taking of steps necessary to fix the indorser's liability.

3. In *P v. T*, 76 S. E. 153 (Ga.), written agreement to accept a bill of exchange to be drawn in the future is valid, if the bill is drawn in accordance with the agreement, and within a reasonable time, in favor of the person who received it for a valuable consideration.

CHAPTER XXIV.

CHECKS

- 195. INTRODUCTION
- 196. DEFINITION
 - 1. Use
 - 2. Post-Dated or Ante-Dated
 - 3. Parties
- 197. WHEN TO BE PRESENTED
- 198. CERTIFICATION
- 199. CERTIFICATE OF DEPOSIT
- 200. CASHIER'S CHECK
- 201. VOUCHER CHECK
- 202. FORGERY
- 203. QUESTIONS
- 204. DECISIONS BY THE COURTS

195. **Introduction.** The business man deposits his money with a bank for several reasons. It is a safe place to keep it, he may receive interest on the deposit or on a part of it, it is ready for him at any time, and by means of an order on the bank the money or any part of it may be transferred to another person.

The right to draw is based on the fact that credit is presumably obtained at the bank by becoming a depositor. To become a depositor, an introduction to the bank is usually obtained and the funds one desires to deposit are listed on a deposit slip and passed in to the teller, who enters the amount in a pass-book which the depositor keeps as a receipt for his deposit. A credit is now established, also the right to issue checks against the amount deposited. As checks are presented and paid by the

banker they are at once charged against the depositor's account. These checks are also stamped "paid," and at stated intervals the account is written up and cancelled checks are returned to the depositor bearing the payee's indorsement, thus becoming receipts.

Two general methods of depositing are recognized; one, a commercial account against which checks may be drawn, and one, a savings account against which checks are not to be drawn. In the first, money is withdrawn by means of a check, and in the second, by presenting the pass-book and having the amount withdrawn entered.

196. **Definition.** A check is a written order by a depositor on his banker to pay a certain sum of money to another. There are three necessary parties to a check, the maker called "drawer" (who is the depositor), the drawee, or banker, and the payee (the one to whom the check is made payable). The drawer may also be the payee.

BANK CHECK

<u>May 24 1913 No. 675</u>	
Commercial National Bank (B3)	
OF CHICAGO.	
<u>Pay to the order of</u>	<u>E. F. Patch</u>
<u>Seventy five and no/100</u>	<u>\$75⁰⁰</u>
<u>Dollars.</u>	<u>W. A. Evans</u>
GA409721	

A check is subject to the usual requirements of negotiable paper; it is an order, it must be drawn on a bank or banker, it purports to be drawn against a deposit, it must designate a payee, it must be for the payment of a certain sum of money, it is not entitled to days of grace, and it should be dated.

In the above check W. A. Evans is drawer, E. F. Patch the payee, and the Commercial National Bank is the drawee.

The lettered number is a key number used by bankers to assist in detecting forgery. On the issuing of blank checks to a depositor the latter's receipt for them is taken. Thereafter, if a teller should become suspicious of a depositor's signature he would compare with the depositor's receipt for blank checks to see if such a key-numbered check had been issued to this depositor. If no such receipt is found, the signature is probably a forgery.

1. *Use.* The check is one of the chief instruments of payment; it affords ready means of transferring money from one account to another. The check is intended for immediate use. If a check is payable to bearer, no indorsement is necessary, although an indorsement is usually demanded more as a means of furnishing evidence than of holding the indorser liable. If a check is payable to order, bankers may require an identification and indorsement before payment.

2. *Post-Dated or Ante-Dated.* It is not material whether the check bears the present date, is post-dated, or is ante-dated. Post-dating is an everyday occurrence among business men. If the bank pays before the date named it does so at its peril.

3. *Parties.* Like a draft, a check has three parties: drawer, or depositor; drawee, or banker; and payee, or holder. The holder has no recourse against the drawer until presentment has been made. It is the duty of the drawer to have funds available for the prompt payment of the check. The holder must be prompt in presenting the check for payment, and must notify the drawer in case payment is refused so that the drawer may protect himself.

197. *When To Be Presented.* Since checks are not for circulation, they must be presented to the bank within a reasonable time, but circumstances alter cases. If the bank is in another city, then more time for presentation must be granted; the check must not be locked up, however. It must be started towards its destination, the bank, generally within twenty-four hours after its receipt. If all parties live in the same town, the check should be in the bank the following day or the drawer will be released

so far as any loss may be concerned. If a check is put in circulation and more time is thereby consumed than the law allows the holder, the drawer is released, but not so as to the immediate indorser.

The above must not be construed so as to release the drawer of the check in case the delay does not injure him. Thus a check might not be presented for a year. This of itself would be no cause for releasing the drawer. The delay must work an injury to effect a release.

198. **Certification.** Checks are not intended for extended circulation as are bills of exchange, yet business demands require this to some degree. If the banker signifies his willingness to do so a certification may be given, and then the check may be circulated subject only to the Statute of Limitations. The banker

CERTIFIED CHECK

CHICAGO, ILL. May 16, 1912. \$472

Farmers National Bank
MARQUETTE B'LDG.

Pay to the order of James Smith \$75⁰⁰

Deposited here May 16, 1912 \$75.00

Greenwood

is therefore absolutely liable for the payment. Certification somewhat resembles an acceptance, but while there are some similar points, there are several points of difference. In the acceptance of a draft the drawee becomes absolutely liable, and the drawer remains conditionally liable. In the certification of a check the bank or banker becomes absolutely liable, while the drawer may or may not continue conditionally liable. First, if the certification of the check is at the solicitation of the drawer, then he continues liable; but if the request is made by the holder, the drawer is

released from further liability; the holder may then only look to the bank for payment. By certifying a check the bank is precluded from denying the genuineness of the drawer's signature, but does not guarantee as to the body of the check or the indorsements. The teller, cashier, or president of the bank is the proper party to bind a bank by certification. The bank in effect says: "The signature of the drawer of this check is genuine, and if it turns out to be forged it is our loss, not yours; the drawer has enough funds here to pay it, and we will retain the money and apply it for that purpose only, and should we fail so to do, we, nevertheless, will pay the check. But if it should develop either before or after the actual payment of the check that the amount has been fraudulently raised—either before or after our certification—we will pay only the amount it was originally issued for; and if we have paid more than the latter, you will have to make good the difference. Further, we have said and warranted to you that the signature of the drawer is genuine (that we are supposed to know); but we do not know anything about the genuineness of the signatures of the indorsers on the check, and you, in asking for this certification, or for subsequent payment thereunder, have said, in law, to us that the indorsers' signatures are correct, and if they are not that you will make good to us any loss by reason thereof." Certification then, admits of three things: (1) That the signature of the check is good and genuine; (2) that the drawer has sufficient funds in bank to meet the check; (3) that the bank will retain the funds for the holder.

199. Certificate of Deposit. This is an instrument that acknowledges the receipt of a sum of money in deposit with a bank or banker. Checks cannot be issued against such a deposit. It is a negotiable instrument and usually draws interest. It is in legal effect a negotiable promissory note. (See next page.)

200. Cashier's Check. This is a check issued by a banker drawn by himself on his own bank and is furnished to customers who wish to remit money to other than to one of the great money centers. (Illustrated on page 176.)

CERTIFICATE OF DEPOSIT

**BANK OF ROUND LAKE**

\$750⁰⁰ Turn Bridges Montana May 11 1909
 J. M. Miller has deposited in this Bank
~~Seven Hundred & Fifty Dollars~~ Dollars
 for ~~12~~ months payable to the order of himself
 on the return of this Certificate properly endorsed with six per cent interest
 per annum; no interest after maturity
 No 3784

Bank & certain Deposits Co Chicago

Cashier

CASHIER'S CHECK

Continental and Commercial National Bank

of Chicago



Pay to
the order of

Chicago, June 26, 1913 No. 5109

J. A. Adams & Co. \$12⁷⁵
 NOT OVER FIFTEEN DOLLARS \$15
 Twelve Dollars

CASHIER'S CHECK



Herbert Foote
Cashier

CHECK, DRAFT FORM

COUNTERSIGNED
James Ramsey
 Pres.
 Secy.



THE SCHOOLMASTERS CLUB No. 1009

CHICAGO, ILLS. May 14 1913

Pay to the order of William B. Rothwell \$60⁰⁰
 Sixty and no/100 DOLLARS

TO FORT DEARBORN NATIONAL BANK,
 CHICAGO, ILLS.

THE SCHOOLMASTERS CLUB

J. B. Whitney
 Treasurer

201. Voucher Check. This is a form of check that is increasing in popularity with business houses. In addition to an ordinary check there is a description of the particular account or item that is being paid. The account that is being paid is generally itemized and its distribution to a special account shown. The voucher check is thus a complete receipt in that its indorsement and circulation acknowledges a receipt of the amount of money

VOUCHER CHECK FORMS

INDORSEMENTS

The payee acknowledges the payment of the amount as itemized on settlement memorandum which accompanied this check.

INDORSE BELOW

DATE		FOR	AMT.	
1913				
Apr. 5		Rent for		
		April, 1913	36	
		24 Elm St.		
<p style="text-align: center;">INDORSE BELOW</p> <p>No receipt necessary. Indorsement will act as such</p>				

and also its application to a particular debt or account. An ordinary check is but an acknowledgment of a payment of a certain sum. The voucher check generally bears several signatures and is issued in a variety of forms, some simple and others complex.

202. Forgery. Forgery consists "in fraudulently making or altering any writing, to the prejudice of another's rights." Usually forgery is committed by signing another's name, as in indorsing a check that the forger has found or stolen. Where one signs his own name to an instrument but passes it as the instrument of another party of the same name he is guilty of forgery. The use of an assumed name is not forgery unless it is done with the intent to defraud.

To constitute forgery in the making of an instrument two things must be present. First, the writing must appear to create a liability, and, second, there must be a fraudulent intent.

Any material alteration of a completed instrument whereby one's responsibility is increased is forgery, but the correction of the language where ungrammatical is not forgery. Since delivery is the final essential element to a negotiable instrument, so the forgery is not completed until delivery is made.

Where one adopts as his own a signature that is forged, it has generally been held that he assumes the liability of such party. The acceptor of a draft is estopped from denying the genuineness of the drawer's signature. One who issues paper is a guarantor of the genuineness and capacity of the previous parties.

In order to guard against forgery and fraud, the banker requires the drawer of a check to leave his signature with the banker when he becomes a depositor. This is to afford the banker an opportunity to compare signatures. The highest courts of the country have laid down the following rule: "The maker of a check is obliged to use all due diligence in protecting it; the omission to use the most effectual protection against alteration is evidence of neglect which renders him responsible for the fraudulent amount, the bank being liable only for genuineness of the signature, and ordinary care in paying the check." "When the drawer has drawn his check in such a careless and incomplete manner that a material alteration may be readily accomplished without leaving a suspicious appearance, he himself prepares the way for fraud, and if it is committed, he, and not the bank, should suffer."

203. QUESTIONS

What is a check? Illustrate its use. Explain post-dating. Name the parties to a check and compare with parties to a draft. When must a check be presented?

What is certification? What difference does it make if procured by the drawer or a holder? Why this distinction? What three things does it admit.

What is a certificate of deposit? How does it differ from an ordinary deposit?

What is a forgery? What effect has alteration on one's liability? What two things must be present to constitute forgery?

What is a voucher check? What is a cashier's check?

204. DECISIONS BY THE COURTS

1. In *S v. G*, 85 A 281 (R. I.), the ordinary relation of banker and depositor on a general deposit is that of debtor and creditor.

2. In *P v. N. B*, 151 S. W. 774 (Mo.), where a depositor presented a check for deposit, he and the bank could agree that payment should be deferred for a reasonable time until the bank ascertained whether there were sufficient funds of the drawer to pay it.

3. In *B v. C*, 126 P 886 (Wyo.), a check is usually defined to be a draft or order on a bank for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, payable instantly on demand.

The payment of a check may be stopped or countermanded at any time before it is actually presented and paid; but the drawer assumes the consequences of his act in so doing.

4. In *B v. G*, 126 P 498 (Col. App.), an order drawn by one on his deposit in a savings bank, which, though on its face payable on demand, was, by reason of a requirement of the bank, not to be paid till after 30 days' notice to it, and, by condition of the deposit, required presentment with it of the depositor's pass-book, of which fact its indorsee had notice, is merely a non-negotiable chose in action.

5. In *H v. T*, 99 N. E. 305 (Ohio), it is not negligence per se for a bank which has received a certificate of deposit for collection to send it by mail to the issuing bank for payment, where such is the custom and there is no other bank where the certificate is issued.

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CHAPTER XXV.

ESSENTIALS OF INDORSEMENTS

- 205. INTRODUCTION
- 206. KINDS OF INDORSEMENTS
 - 1. Blank
 - 2. Full
 - 3. Restrictive
 - 4. Qualified
 - 5. Conditional
 - 6. Waiver
 - 7. Guarantee
 - 8. O. K.
- 207. SEVERAL INDORSEMENTS
- 208. THE INDORSER'S CONTRACT
- 209. QUESTIONS
- 210. DECISIONS BY THE COURTS

205. Introduction. The essential part of an indorsement is the signature of the indorser. The usual signature of the indorser should be given. If the name of the payee is incorrectly spelled, the indorser should write it as given and then follow it by his proper signature, also indicating that both signatures are in fact but one. Any writing showing the intent of the indorser is sufficient. Whatever extra writing is used other than the signature must be words of transfer or the special character of the indorser's contract. In conclusion, the indorsement must be by the payee, his agent, or subsequent holder, and must follow the tenor of the instrument. It accomplishes two things—it transfers the title, and it carries with it the law merchant liability of the indorser. The indorsement should be written crosswise on the

back of the paper—the first one at the left end, the others in order.

The law merchant does not permit of a partial indorsement. The indorsement is completed by delivery.

206. Kinds of Indorsements. There are several kinds of indorsements; viz., blank, full, qualified, restrictive, conditional, waiver, guarantee, and O. K. The first two are in general use, the others are not so frequently used.

1. *Blank.* This indorsement consists simply in writing the signature of the indorser on the back of the paper. A blank space should be left above the signature. The instrument is now payable to bearer, as the holder's name is not designated. If lost or stolen, it might be put into circulation to the loss of the proper owner. The paper may now be passed from hand to hand by mere delivery; however, an indorsement should be demanded, for each indorser adds credit to the instrument. If no indorsement is required, the transferrer assumes only the common law liabilities which extend to the receiver only.

2. *Full.* An indorsement in full includes the names of both the indorser and the indorsee. Negotiable words are not necessary. If the instrument is negotiable it will continue so until the words expressly denying this appear in some indorsement. Blank indorsements may be filled out and thereby become indorsements in full. Writing may be added to an indorsement provided it does not change the liability of the indorser. If there are several indorsements in blank, the last holder may make any indorsement, one in full, and reject the following ones; or he may fill out each one so as to show a record of full indorsements from the payee to the present holder. An indorsement in full cannot be changed by a subsequent party to one in blank. Blank and full indorsements are known as absolute indorsements. The liability of the indorser is subject to demand and to the usual protest and notice of the same.

3. *Restrictive.* If the holder desires to transfer, yet wishes to restrict the circulation of the paper, it may be accomplished

by showing such intention in his indorsement. The usual form is to name the indorser and use the word "only." The object of such an indorsement frequently is to vest the title in one for the benefit of a third person, or to show that the indorsee is simply an agent of the indorser. Any subsequent transfer would be subject to the law of assignability.

4. *Qualified.* In this indorsement the indorser escapes the liability as known to the law merchant, in that he does not guarantee the payment of the paper. He cannot thus escape the common law liability. The usual form is to include the words "Without recourse," written above the indorser's signature. The indorsement may be either in full or in blank. If one holds a note secured by a mortgage and wishes to negotiate the note, he generally uses the qualified indorsement, as the mortgage is sufficient security.

5. *Conditional.* In a conditional indorsement the holder parts with possession, but does not pass a full title to the indorsee. The condition may be either precedent or subsequent: as, "Pay to A when he arrives at 21 years of age"; "Pay B unless I give you notice not to pay."

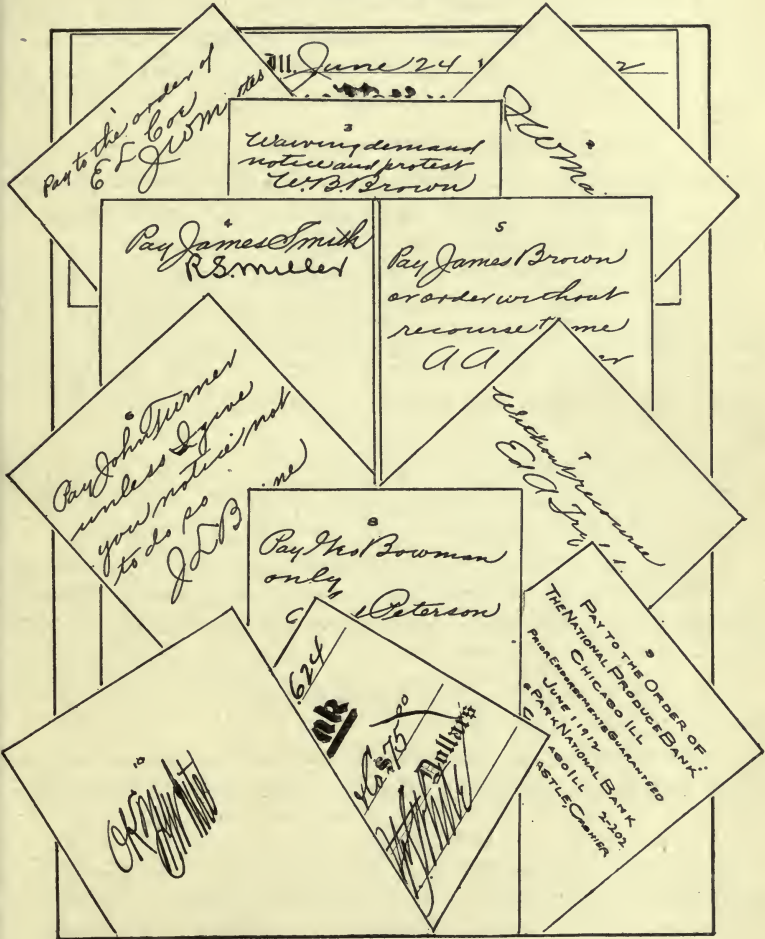
6. *Waiver.* An indorsee may not desire to accept a transfer of the instrument unless the indorser is willing to waive some of the requirements incident to making the liability of the indorser absolute, and, if so, he demands a waiver indorsement. The usual form is, "Demand, protest and notice waived," following this with his signature. The object is to avoid the necessity of protesting.

7. *Guarantee.* This is an indorsement frequently given, in which the indorser guarantees the prior indorsements. It is frequently used by banks.

8. *O. K.* This is an indorsement of identification. A receives a check from B. If A is not acquainted at the bank and has no means of furnishing identification, he asks B to O. K. the check. B does this by writing the letters O. K. above his signature on the back of the check. Any one may now secure the money from the bank, but he is requested, however, to indorse

the name of the payee on the check. This is not an indorsement of transfer. It is made by the maker of the check as a means of identification.

INDORSEMENTS



207. Several Indorsements. Forms. Each indorser adds his conditional liability to the bill which accrues to the benefit of

all subsequent holders unless he makes use of a qualified indorsement. In case of a refusal to pay on the part of the one absolutely liable, as the maker of a note, the holder may proceed against any prior indorser. So far as an innocent holder is concerned the indorsers stand in the order in which their names appear on the instrument. As between two mediate parties who are indorsers the one that appears to be second may in fact be first and it may be shown as between themselves.

208. The Indorser's Contract. The indorser's contract includes provisions from both the law merchant and the common law. The law merchant liability resulting from an indorsement is conditional. The common law liabilities are absolute.

First, when one indorses an instrument two results are effected—a transfer of title in the instrument, and the assuming of conditional liability. In substance the indorser in writing his signature says, “here is the evidence of my title to this instrument,” and the law merchant says for him, “I will pay if the maker does not.”

Second, the common law says for him that the instrument is what it purports to be; that he has a lawful title to it; that it is genuine, and that the parties to the contract are competent.

The one who transfers an instrument payable to the bearer, or indorsed in blank, without indorsement assumes only the common law liability and that extends but to his own transferee, likewise.

The one who uses an indorsement “without recourse” assumes the common law liability.

The method of changing the conditional liability of the indorser to absolute liability is discussed under demand and notice.

209. QUESTIONS

What is an indorsement? What does it accomplish? Name the different kinds of indorsements. What ones are in general use? What is a blank indorsement? What risk is assumed in holding or mailing paper with such an indorsement?

What is a full indorsement? What may be done where blank indorsements appear? What is a restrictive indorsement? When used? What

is a qualified indorsement? When used? If liability is evaded by its use why not use it always? What is a conditional indorsement? Explain its use? What is a waiver indorsement? Its object? What is a guarantee indorsement? Its object? What is an O. K. indorsement? How used?

To whom is an indorser liable? Discuss the law merchant and the common law liability of the indorser.

Why should an indorsement always be demanded when one receives negotiable paper?

210. DECISIONS BY THE COURTS

1. In *A v. B*, 1 N. Y. 213, the acceptor paid a draft as an accommodation to the drawers, who failed and did not reimburse him. He then discovered that one of the firm of drawers had forged the indorsement of the payee, who had no interest in or knowledge of the draft. The acceptor then sued the collecting bank for the return of the money as warrantor of all previous indorsements. He failed, since a payee cannot always demand genuine indorsements on his paper, if such signature could not benefit him.

2. A note, payable in New York, was made and placed in circulation in Indiana, where the maker of the first indorsement lived. It was held that the contract of indorsement in such case is governed by the law of the place where made, and not by that of the place where the note is payable, 15 Ind. 33; 81 Ky. 636; 77 N. Y. 573; and other cases.

3. A note bore two indorsements. When it fell due, one of the indorsers tendered two months' interest in advance to the payee and it was accepted. It was held that the acceptance of interest by the payee was an extension of the time of payment and the other indorser was thereby released. 102 Wis. 41. An extension of time, either actual, or constructive, if made without the consent of indorsers releases them.

4. A note was indorsed as follows: "Pay to the order of.....
Mary W. Gaylord."

The payee sent the note to her son to be sold for her account. The son pledged it to a bank as a security for a loan. It was held that indorsement in the above form was notice to the world that Mary W. Gaylord had not yet parted with title to the note, and that the bank acquired no title or interest even though it took it in good faith believing it belonged to the son. 74 N. W. Rep. 215. The indorsement must show, directly or by implication, to whom title is transferred.

CHAPTER XXVI.

CONDITIONS OF TRANSFER

211. INTRODUCTION

1. Transfer in Good Faith
2. Transfer in Usual Course of Business
3. Transfer for Value
4. Transfer Before Maturity

212. STOPPING PAYMENT

213. QUESTIONS

214. DECISIONS BY THE COURTS

211. Introduction. Negotiable paper since its inception has afforded safe and ample means for the purpose of transferring values between traders. The indorsement is the usual means of showing the intention of the indorser to transfer title to the indorsee. The law merchant recognizes certain well-defined conditions as precedent to the transfer of title to another. If these conditions have been complied with, the indorsee gets a complete title. It frequently occurs that the purchaser has a better title than the seller. All conditions affecting the standing of the instrument, when interpreted as between the original parties, cease when a proper transfer has been made. Negotiable paper is "a courier without baggage." The conditions of the transfer are as follows: (1) Transfer in good faith without notice; (2) Transfer in the usual course of business; (3) Transfer for value; and (4) Transfer before maturity.

1. *Transfer in Good Faith.* In order to transfer a perfect title the utmost good faith must exist between the parties. The purchaser must have no notice, either actual or constructive, of any irregularity or lack of consideration existing between the original parties. If the note was lacking in consideration between

the original parties, the purchaser would take the paper subject to these conditions if he had notice. If the note was one of a series, so indicated, a purchaser of one of the notes not yet due would not be a purchaser in good faith if he knew that one of the series was due and not paid. Likewise, the purchaser of a note on which an interest payment is due and unpaid would not receive full protection. Such paper is subject to defenses.

If notice is had subsequent to acquiring title, it will not affect the holder's rights. After a transfer has been made *bona fide* and title is fully acquired, all defects are cured and a subsequent transferee acquires full title, notwithstanding he has notice.

Statutory enactment has provided that notice of the character of the consideration of a negotiable instrument may be conveyed to the purchaser as follows: "given for a patent right," or "given for a speculative purpose." This may be written or printed across the face of the instrument and all who acquire it take it subject to such defenses as may exist.

2. *Transfer in Usual Course of Business.* The second element of transfer is that the transfer must be effected in the usual course of business. A purchaser for value is usually considered to be one who acquires title in the usual course of business. The term "usual course of business" means "according to the usages and customs of commercial transactions." A title acquired by legal process is not so acquired. It is subject to equities existing against the holder from whom the title was taken.

3. *Transfer for Value.* This expression means the taking of title for a valuable consideration. The term "valuable consideration" comes from the common law, and in the law merchant is subject to the same tests as at common law. The holder of paper as collateral security is a holder for value to the extent of his lien so as to enable him to defeat equities existing between the original parties. An eminent jurist lays down the doctrine that receiving collateral in payment, or as security for a pre-existing debt, is receiving it for a valuable consideration. "Thus it may pass, not only as a security for new purchases and advances made upon the transfer thereof, but also in payment of, and as

ORDER TO STOP PAYMENT

Chicago, *May 24* 191*3***TO CONTINENTAL AND COMMERCIAL NATIONAL BANK
OF CHICAGO.**Please STOP PAYMENT of Check, No. *2067*dated *May 20* 191*3*, issuedto *Jas. A. Stephenson*for \$ *104.60*, for the following reason:*For failure of consideration in contract**dated May 15, 1913*

I
.....hereby agreeing to hold you harmless for said amount,
and all expenses and costs incurred by you on account of your
refusing payment of said check, and agreeing further not to hold
you liable on account of payment contrary to this request if same
occur through inadvertence or accident only.

Respectfully,

E. H. Dennis

Depositor.

security for, the pre-existing debt. In this way the creditor is enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of value equivalent to cash. Otherwise, the discounts, by banks, of negotiable securities are restricted, and credit and circulation of negotiable paper hampered." This is the general view throughout the country, with the exception of a few states.

4. *Transfer Before Maturity.* Negotiable paper is presumably payable at its maturity, and if not paid then it is open to suspicion. If equities are available against the present holder, they will be available against any subsequent holder who obtains title after maturity. If, however, a holder, in good faith, intervenes before maturity, then a subsequent holder, although after maturity, will take the latter's rights. Likewise, after an instrument has been dishonored, protested and notices sent, it may be put into circulation by an indorsement.

212. **Stopping Payment.** The receipt of a check by a payee does not give the holder any claim against the drawee; in other words, the issue of the check does not work an assignment of so much of the drawee's funds with the banker. The drawer may direct the drawee to dishonor or refuse payment of the check issued. This is called stopping payment; however, it is at the risk of the drawer for damages.

213. QUESTIONS

What are the conditions of transfer? What is "transfer in good faith?" Illustrate.

What is the effect if one receives paper knowing that full consideration was not given? Does it make any difference if notice is received before or after acquiring the paper?

Explain "transfer in the usual course of business." Give illustrations. Would receiving the paper from a notorious gambler have any effect on your title? Explain fully.

Explain "transfer for value." Illustrate. Would receiving a note at a discount be receiving it for value? What if the discount was as great

as fifty per cent? When must the transfer be made to be fully within the provisions of the law merchant? .

How may one receive paper after maturity and still have a good claim against a set-off?

214. DECISIONS BY THE COURTS

1. In *M N B v. H*, 33 Minn. 40, the plaintiff sent for collection to one, Luce, its agent, certain notes indorsed as follows: "For collection account of Merchants' National Bank, St. Paul." Before their maturity Luce transferred them by indorsement to the defendant in payment of his own private debt. It was held that the defendant receiving them with the above indorsement uncanceled, and without making any inquiry, acquired them not merely negligently but in bad faith and could not protect himself as a *bona fide* purchaser against the plaintiff's superior right. To be a *bona fide* holder one must take paper without notice, either actual or constructive, of any fraud, defect of title, or illegality of consideration in the transferrer's hands.

2. In the 42d S. W. Rep. 1055, a certain note, which was one of a series of five and so mentioned on the face of the note, was transferred before maturity to one who knew that one of the notes of the series was past due and unpaid. It was held that the purchaser of the first mentioned certain note took it subject to the offset and defenses of the maker.

3. In *M. R. Burr*, 452, a bank note was stolen and came to the hands of the plaintiff, and he was held entitled to it. The Court of K. B. considered bank notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note, for a full and valuable consideration, by giving money in exchange for it, in the usual course of business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note.

4. In *3 G v. Burr*, 1516; 1 Black, Rep. 785, a bill of exchange, payable to bearer, was lost, and the finder paid it to a grocer, for teas, and took the change. The Court laid stress on the facts that the holder came by the bill *bona fide*, and in the course of trade, and for a full and fair consideration, and that though he and the real owner were equally innocent, yet he was to be preferred for the sake of commerce and confidence in negotiable paper.

CHAPTER XXVII.

ADDITIONAL CONTRACTS

- 215. INTRODUCTION
- 216. LETTERS OF CREDIT
 - 1. How Used
- 217. TRAVELLER'S CHECK
- 218. BONDS
- 219. WAREHOUSE RECEIPTS
 - 1. How Used
- 220. BILLS OF LADING
 - 1. How Used
- 221. NEGOTIABILITY
- 222. QUESTIONS
- 223. DECISIONS BY THE COURTS

215. Introduction. Business necessity has contrived and put into use a number of contracts that are sometimes classed as quasi-negotiable. These contracts have not been afforded full negotiability largely because business necessity does not require it. The chief ones are letters of credit, bonds, warehouse receipts, and bills of lading.

216. Letters of Credit. A letter of credit is an instrument somewhat similar to a draft. It is payable at the convenience of the purchaser, and in the currency of the country where payable, but it is not primarily for negotiation. It is largely used by travelers.

1. *How Used.* For example, A wishes to travel in Europe. To take the currency (gold) of this country would subject him to the inconvenience of carrying it, to say nothing of liability to

loss. Again, if required to change this currency to the currency of the country where he happens to be traveling, he would be charged with the exchange each time. Instead of doing this, he goes to his banker, before leaving home, and buys a letter of

£1000*

CIRCULAR

LETTER OF CREDIT

This Credit is in force until
June 1st 1913.



No. 9125.
£1,000 #Stg

Illinois Trust & Savings Bank

Gentlemen:

POUNDS.

Chicago June 1st 1912.

We will serve to introduce to you
Mr. John Doe _____ in whose
favor we beg to open a credit with you collectively for the sum
of One thousand _____ Pounds Sterling,
to which extent be pleased to furnish payments in sums as required
inscribing the amounts so paid on the back of this letter.

In reimbursement you will take CASH - sight draft on
The Union of London & Smiths Bank, Ltd. London, Eng. inserting therein the Date and
Number of this credit, which we engage shall meet with due honor.

Your charges are to be paid by the bearer hereof.

This letter must be returned with the last Draft.

Recommending Mr. Doe _____ to your usual courtesy

We remain Gentlemen

Your obedient servants

To Messieurs the Correspondents of the
Illinois Trust & Savings Bank

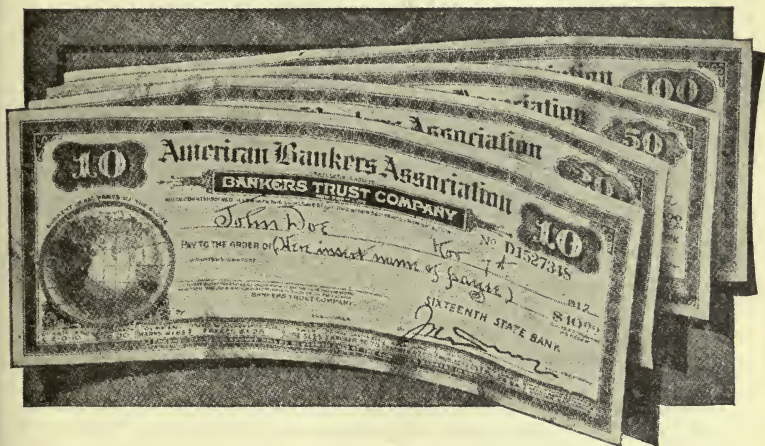
Arthur Mann
Cashier

N. B. The bearer is advised to keep the list of correspondents apart from the Letter of Credit to prevent their being lost or stolen together; also to affix IMMEDIATELY his personal signature at place indicated on the inside of the cover of the list of correspondents as a precaution against forgery on the part of the list of correspondents or Letter of Credit falling into improper hands. The Illinois Trust and Savings Bank will not be responsible for the consequences arising from an omission by the bearer to observe these precautions.

credit. This letter is directed to, and payable at different banks in the several countries he intends to visit. In the course of his journey and as he desires to use the money, he presents this letter at a specified bank and asks for a certain sum of money. The payment will be indorsed on this letter, and from this each subsequent bank can readily determine the balance due.

217. Traveler's Check. At the present time it is quite customary for the traveler to make use of drafts for small amounts which he procures from his bankers or from express companies. These are generally known as travelers' checks. They are less formal than the letter of credit. These checks are negotiable. When paid they are paid in full.

TRAVELER'S CHECK



218. Bonds. A bond is an obligation in form and effect similar to an ordinary promissory note, but it differs in that the bond is under seal and under the law merchant is not negotiable. Its transfer is governed by statutory enactment, and according to the wording of the bond is negotiable or non-negotiable. Bonds are chiefly issued in case of money borrowed by a municipality or by a corporation. It is customary to provide a fund for the

STATE OF IOWA.

No. 257 \$1000

TRI-CITY RAILWAY COMPANY

MORTGAGE FIVE PER CENT. GOLD BOND.

The *Tri-City Railway Company*, a corporation duly organized and existing under the laws of the State of Iowa (hereinafter called the *Company*), for value received, promises to pay to the bearer, or, in case of registration, to the registered holder hereof, the sum of **ONE THOUSAND DOLLARS (\$1000)** in gold coin of the United States of America, of or equal to the present standard of weight and fineness, on the first day of September, A.D. 1922, and also interest thereon in the meantime, from the first day of September, A.D. 1922, at the rate of five (5) per cent per annum, payable semi-annually, in like gold coin, on the first days of March and September in each year, upon the presentation and surrender of the annexed coupons, as they severally become due, at the office of the *German Trust Company*, in the City of Davenport, State of Iowa.

It is agreed by the holder of this bond that no recourse shall be had for the payment of principal or interest to any Stockholder, Officer or Director of the Company, either directly or through the Company, by virtue of any statute, or by the enforcement of any assessment or otherwise.

This bond is one of a series of one thousand (1000) bonds, numbered consecutively from one (1) to one thousand (1000), both inclusive, each of the denomination of One Thousand Dollars (\$1000), and of the same date, tenor and effect, and all equally secured by the Mortgage or Deed of Trust of even date herewith duly executed and delivered by the Company, and conveying to the *German Trust Company* of the special use of Davenport, Iowa, as trustee, all the real property, except certain unimproved land in *Scott County, Iowa*, particularly described in said Mortgage, personal property, property rights, ordinances, and franchises now held or owned, and which may hereafter be acquired by the said Company, in the States of Iowa or Illinois.

This bond shall pass by delivery, and may transfer on book, kept for that purpose at the office of said *German Trust Company*, Registrar. After a registration of ownership as to the principal thereof, noted hereon, no transfer shall be valid except upon said books, unless the last preceding transfer be to the bearer. The coupons hereto annexed shall, in all cases, be payable to bearer, whether the bond itself is registered or not.

This bond shall continue subject to registration, and to transfer to bearer, at option of the holder. Each registration shall be evidenced by the memorandum of the Trustee upon the back hereof.

This bond shall not be valid and obligatory unless authenticated by certificate endorsed hereon by said *German Trust Company*, Trustee, that it is one of the bonds secured by the aforesaid Mortgage or Deed of Trust.

In Witness Whereof the *Tri-City Railway Company*, has caused this bond to be signed by its President or Vice-President and Secretary, and its corporate seal to be hereunto affixed, and a fac simile signature of its Secretary to be impressed upon the coupons hereto annexed, on this first day of September, 1922.

Tri-City Railway Company,

Attest:

Secretary

By

President



purpose of paying bonds when due. As a rule, bonds draw interest, payable periodically, the interest payments being evidenced by small notes known as coupons; as they fall due they are detached and collected.

BOND COUPONS

On the First Day of SEPTEMBER 1922	\$25 ⁰⁰
TRI-CITY RAILWAY COMPANY	
<p>will pay to the bearer hereof TWENTY-FIVE DOLLARS in gold coin of the United States of America, of the present or an equal standard of weight and fineness, at the office of the GERMAN TRUST COMPANY, in the City of Davenport, Iowa, upon the sur- render of this coupon, being the interest due on that day on its Mortgage Five Per Cent Gold Bond of September 1st, 1902.</p>	
No. 40	Jas. F. Lardner, Act. Secretary.

On the First Day of SEPTEMBER 1917	\$25 ⁰⁰
TRI-CITY RAILWAY COMPANY	
<p>will pay to the bearer hereof TWENTY-FIVE DOLLARS in gold coin of the United States of America, of the present or an equal standard of weight and fineness, at the office of the GERMAN TRUST COMPANY, in the City of Davenport, Iowa, upon the sur- render of this coupon, being the interest due on that day on its Mortgage Five Per Cent Gold Bond of September 1st, 1902.</p>	
No. 30	Jas. F. Lardner, Act. Secretary.

[Usually attached to Bond Certificates.]

WAREHOUSE RECEIPT

Chicago & Cincinnati Elevator and Annex

No. 4

Chicago, Ill., June 12, 1913.

Received in Store from J. W. Smith

One Thousand _____ Bushels

of No. 2 Spring Wheat subject only

to the order hereon of L. Y. Browning

and the surrender of this receipt and payment of charges.

It is hereby agreed by the holders of this receipt that the grain herein mentioned may be stored with other grain of the same grade by inspection. Loss by fire or heating at owner's risk. This grain is subject to our advertised rates of storage.

Not Good Unless Countersigned and Registered.

W. H. WHITNEY, Lessee.

1000 Bush. 60000 Lbs.

S. B. Brown

R. J. Kelley

219. Warehouse Receipts. So far as these instruments are concerned, their use is confined to places for storage of property for sale, notably produce and grain. When, for example, grain is delivered, a receipt is given. It is both a receipt and a contract, a receipt in that it recites the receipt of the property by the warehouseman, and a contract in that it contains an agreement to safely keep the property.

1. *How Used.* The warehouse receipt is a commercial instrument of great importance. In the grain business millions of bushels are stored each year, for which warehouse receipts are issued and a regular storage fee charged. The grain is bought, sold and delivered by means of transferring this receipt, which represents the title. The transfer of the receipt with the proper intent effectively conveys the title to the purchaser, but the liability of an indorser does not follow. The instrument, then, lacks this element of negotiability.

220. Bills of Lading. A bill of lading is an instrument issued by a common carrier upon the receipt of goods for transportation. The instrument is both an acknowledgment of the receipt of goods for transportation and a contract. As a receipt it is subject to parol explanation, while as a contract it is not.

1. *How Used.* The bill of lading is of great efficiency to afford facilities for the transfer of credit. The grain-buying business in the western states furnishes a good illustration of this use. Warehouse receipts are used as collateral in much the same way. In indorsing a bill of lading, the usual methods of indorsement may be used. Conditional indorsements are frequently used. Another method is to indorse, directing the railroad company to deliver the shipment to the consignee upon the receipt of all charges. The use of these receipts may be further illustrated as follows: A grain buyer who has a cash capital of five thousand dollars, arranges with a commission house to sell all the wheat he ships, and with a banker who agrees to cash drafts that are accompanied by bills of lading as security. The buyer goes into the wheat country with his five thousand dollars and invests it in wheat, which is subsequently delivered to the

railroad for transportation. He receives a bill of lading for the wheat. He draws on his banker for the proportionate amount of the cost of the wheat, attaches the bill of lading properly indorsed, and cashes the draft. The banker has the title to the wheat evidenced by the bill of lading as security. When the commission merchant effects a sale he deducts his various charges and also pays the draft held by the banker. The remainder goes to the grain buyer, who in the meantime has invested the proceeds of the discounted draft and perhaps repeated the process several times.

While the grain buyer's capital is but five thousand dollars, his working capital for the season may exceed a hundred thousand dollars. He is thus, through the agency of the bill of lading and the draft, enabled greatly to increase his profits in a perfectly legitimate way.

221. Negotiability. These instruments do not possess all the elements of negotiable paper. For example, the guarantee of the indorser does not follow. A perfect title, however, is given, which is no greater than that possessed by the indorser. The guarantees of the common law exist in favor of the holder. The conditional guarantee of the law merchant is lacking.

222. QUESTIONS

Name some of the instruments that have not been given full negotiability.

What is a letter of credit? Explain its use. What is a traveler's check?

What is a bond? Who issues bonds? Do they bear interest, and how is the interest generally evidenced?

What is a warehouse receipt? Explain its use. What is the measure of the banker's safety who loans on a warehouse receipt?

What is a bill of lading? How is it used to raise money? Discuss the negotiability of these instruments.

223. DECISIONS BY THE COURTS

1. In 6 S. W. Reporter 48, it is held that a bank purchasing a draft with a bill of lading attached, and collecting the draft from the acceptors, warrants to the acceptors both the measure and quality of the goods men-

tioned in the bill of lading. North Carolina and Texas so hold, while Iowa refuses to indorse the doctrine.

2. It is held in 29 Minn. 363 and 91 U. S. 92, that where the consignee named is the same person as the drawer of the draft with bill of lading attached, as where the draft reads, "Pay to the order of ourselves," etc., the bill of lading must not be delivered until payment of the draft. If delivered on acceptance, the collecting bank will be liable for payment of the draft, and this is so even if consignor indorses the bill of lading in blank.

3. In Court of Appeals N. Y. Feb. 5, 1901, G drew a draft on H. & Co., but having no funds with H. & Co., sent them, as collateral for the advance, an order on P. & Co., for 150 bales of cotton. H. & Co. sent the order by messenger to P. & Co., who replied as follows: "Cotton referred to, for account of G, cannot be shipped until next week when we will deliver to you." On this assurance H. & Co. paid this draft. By the time of delivery, G owed P. & Co. more than the value of the cotton and they refused to deliver. The court held that as their promise was without consideration they need not deliver. H. & Co. should have notified P. & Co. that they would not pay the draft or advance on the cotton until they had been promised that the cotton would be delivered, then the promise could have been enforced.

CHAPTER XXVIII.

DEFENSES

224. INTRODUCTION

1. The Distinction
2. Delivery
3. Incapacity
4. Void by Statute
5. Alteration
6. Lunacy
7. Fraud
8. Duress
9. Failure of Consideration
10. Payment

225. QUESTIONS

226. DECISIONS BY THE COURTS

224. Introduction. The defenses offered as an objection to the payment of negotiable paper may be against the instrument or they may be of a personal character. To fully discuss the question it will be well to classify parties as mediate and immediate, and defenses as real and personal. Mediate parties are those who are separated by another party or parties, and immediate are those standing next to each other in their order of liability. A real defense is a defense or objection to the instrument itself, while a personal defense is one arising out of the transaction, and relates rather to the acts that caused the instrument to be issued than to the instrument itself. The following are real defenses: No delivery, incapacity, void by statute, alteration, and, perhaps, lunacy. The following are personal defenses: Fraud, duress, failure of consideration, and payment.

1. *The Distinction.* Personal defenses are good and available between immediate parties or a line of parties with notice.

They cease to be valid as soon as a *bona fide* party intervenes. Real defenses are good against all subsequent parties, whether mediate or immediate. Personal defenses are against the creative act, while real defenses are against the instrument; the former acknowledge the instrument but deny its standing; the latter deny the very existence of the contract.

2. *Delivery*. This is one of the essential elements of all negotiable papers, and to prove that an instrument never was issued with the authority or consent of the maker is to defeat the legal effect of the instrument. Paper stolen and put into circulation by the thief does not in any way obligate the maker. No subsequent holder has a valid claim against the maker.

3. *Incapacity*. This defense, when urged against the enforcement of a negotiable instrument, needs no discussion. Parties lacking capacity are not bound by their contracts. The minor is an example of this class.

4. *Void by Statute*. If the statutes of a state declare an instrument invalid, it cannot be enforced even by a *bona fide* purchaser. While usury is illegal according to statute, it is not necessarily a defense against a purchaser in good faith. Notes given in consideration of wagers or gambling are frequently made void by statute.

5. *Alteration*. If a material alteration is made in an instrument the maker is released. The instrument is not the one signed and delivered. Forgery is a real defense, for it lacks intent and consent on the part of the one whose name is forged.

6. *Lunacy*. This is not necessarily a real defense. But if the maker is an adjudged lunatic, his negotiable instruments are void in the hands of all subsequent parties so far as he is concerned.

7. *Fraud*. If the transaction out of which issues a negotiable instrument is tainted with fraud, it is a personal defense and good only between immediate parties or those having knowledge of it; but if fraud is practiced in the making of an instrument, it is a real defense.

8. *Duress*. When a contract is procured by resorting to force, the delivery lacks both intent and consent. It is therefore voidable but not void. Properly, prompt effort should be made by the maker so that he may not be chargeable with negligence. Duress as a defense is always available against immediate parties, and, at times, will constitute a real defense.

9. *Failure of Consideration*. Consideration as a defense is always presumed between immediate parties, but this presumption may be overcome. As in ordinary contracts, inadequacy is no defense.

10. *Payment*. This is an extinguishment of the contract and may always be offered as between immediate parties. If a transfer is made after maturity by the payee, the defense of payment is good against the subsequent party, because his transferrer has no property in a contract which has already been extinguished. If, however, the payment is made before the maturity of the paper and is transferred before maturity to an innocent purchaser, the defense of payment will not be effective.

225. QUESTIONS

Explain the following: defenses, mediate and immediate parties; real and personal defenses.

What is the distinction between a personal and a real defense?

What constitutes a good delivery? What kind of a defense is incapacity? Give an example. Explain the defense "void by statute."

What effect on the standing of an instrument has an alteration? Is lunacy a personal or a real defense? How does fraud affect a contract? What is duress and when a defense?

To what extent is failure of consideration a good defense? When is payment a good defense and when not?

226. DECISIONS BY THE COURTS

1. In *Town of E v. K*, 84 Ill. 292, where certain negotiable bonds were declared by statute not to be valid and binding until certain conditions precedent were complied with, it was held, that unless it has been so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a *bona fide* holder without notice of the illegality, unless he obtained the bill or note after it became due.

It is by force of the peremptory words of the statute declaring such paper void, that it is held to be void in the hands of an innocent indorsee without notice.

2. In *McS v. N*, 91 Pa. St. 17, where the maker of a note had poor eyesight, was purposely made drunk and then induced to sign an instrument for a much larger sum than the amount he owed, which subsequently and before maturity came into the hands of a *bona fide* purchaser for values without notice of the circumstances of its execution, it was held that if a man voluntarily deprives himself of the use of his reason by strong drink he is responsible to an innocent party for the acts which he performs while in that condition. It was so decided upon the principle that where a loss must be borne by one of two innocent parties it shall be borne by him who occasioned it, and that nothing but clear evidence of knowledge of or notice of fraud or bad faith can impeach the prima facie title of the holder of negotiable paper taken before maturity.

3. In *U v. B*, 1 Harris 601, where the action was upon a note given for a gambling debt, it was held that the contract was in defiance of a prohibitory statute, and that such a case was excepted from the operation of the law relating to negotiable securities; i. e., the nature of the consideration was a good defense against a bona fide holder.

4. In *S B v. McC*, 19 P. F. 204, where fraud on the part of the payee of a note was set up by the maker in a suit by the indorsee, and it was alleged that when he signed the note the defendant was so intoxicated as to be unconscious of the fact, it was held that even "if the evidence had made out a case of gross carelessness on the part of the bank, that alone would not have been sufficient to defeat title to the note." There must have been proof that the bank took it in bad faith or with notice of the fraud.

CHAPTER XXIX

GUARANTY AND SURETY

- 227. INTRODUCTION
 - 1. Parties
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 - 1. Contribution
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- 233. DECISIONS BY THE COURTS
- 234. HYPOTHETICAL PROBLEMS
- 235. CONSTRUCTION WORK
- 236. SEARCH QUESTIONS

227. Introduction. These terms are frequently used synonymously. That there are certain points in common cannot be denied, but it is also undeniable that this looseness of definition leads to misunderstanding. Both guaranty and surety are undertakings to answer "for the debt or default of another," and therefore the agreements must be in writing according to the

Statute of Frauds. The agreements differ materially in the following: A *guaranty* is a separate and distinct contract parallel to another, known as a principal contract, while a *surety* is an undertaking to make good the principal contract of which it is a part.

1. *Parties.* In either case three parties are contemplated, the debtor, the creditor, and the one assuring the debtor's liability, called the surety or guarantor. The debtor is the one primarily obliged to pay some debt or obligation, or who has some duty to perform. The creditor is the one to whom the debt or obligation is to be paid, or the one to whom the performance of the duty is due. The third party is secondarily liable, and undertakes to perform in case the principal debtor fails in his obligation. He receives no benefit from the transaction. The consent of the creditor must be had as well in forming the secondary, as in the principal, obligation.

2. *Consideration.* The consideration exists between the debtor and the creditor as in an ordinary contract. It may be a benefit to the promisor, or a detriment to the promisee, or it may be mutual. The consideration should be expressed in writing, although it is generally sufficient to use the words "value received." If the secondary contract is entered into at the same time as the original one, the same consideration is sufficient for both contracts. If, however, the second contract is entered into subsequently to the making of the original contract, then there must be another consideration to bind the new agreement. The new consideration may be a sum paid to the one conditionally liable, or it may be accomplished by changing the time of payment in the original agreement.

3. *Kinds of Guaranty.* Guaranties are *special* when directed to a particular person, and *general* when addressed to the public. The amount for which the guaranty is given may be limited or it may be unlimited. As to whether a guaranty is to be acted upon at once or is to continue for a reasonable time, depends upon the construction given to the language used. Unless it ap-

pears to be the intention of the party giving the guaranty that it shall be continuous, it will be held to be for the present time.

SPECIAL GUARANTY

Indianapolis, Ind., June 2, 1913.

Carson, Scott & Co.,

Chicago, Ill.

Gentlemen: If you will kindly allow Mr. A. A. Brewer credit for sixty days on a bill of goods not to exceed five hundred dollars, I hereby agree to guarantee the prompt payment of the bill.

Very respectfully,

R. W. Miller

4. *Payment of Note.* If the guarantor of a note writes "I hereby guarantee the payment of the within note," it is generally understood to be an absolute undertaking to pay. If payment at maturity is defaulted, the guarantor is liable without notice and the holder may demand payment at once. If the guaranty reads "I hereby guarantee the collection of the within note," the holder must exhaust all other resources before he can hold the guarantor liable. He must reduce his claim to judgment if the guarantor insists.

5. *Negotiability.* There is no uniformity on this question. However, if the writing in the form of a signature appears on the face of a note with that of the maker, it is called a suretyship and the collateral contract is negotiable. If the agreement is written on the back of the instrument, the liability is that of an indorser.

228. *How Extinguished.* 1. *Notice.* If a continuing guaranty is given and has not been fully taken up, the guarantor may annul the balance by notice, but this notice will not affect the

part already acted upon. The guaranty will extinguish itself by lapse of time.

2. *Acts of Debtor and Creditor.* Any special agreement entered into between the debtor and the creditor, wherein a specific change is made in the nature of the original contract, releases the guarantor or surety. A definite extension of time for a new consideration would be sufficient. An extension of time that is in the nature of a forbearance is not sufficient to release the one conditionally liable. A diversion to another object of the fund for which one becomes responsible will annul the special agreement of guaranty or suretyship. If the debtor and creditor make any material alteration in the contract, it will release the guarantor. It would be substituting a new for an old contract which was not assented to by the guarantor.

3. *Payment.* The contract of guaranty is extinguished when full payment is made by the debtor; the reason for the conditional agreement ceases. A part payment releases the guarantor from a like amount. The guarantor has no right to insist that a payment made by the debtor shall be applied on the debt he guarantees in case there are other debts between the debtor and creditor. The debtor and creditor are sole judges as to the application in such a case. A compromise in regard to the principal debt by the debtor and creditor releases the conditional liability of the guarantor at least to the extent of the compromise.

4. *Release.* If a release based on a sufficient consideration, or one under seal, is given to the debtor by the creditor, the guarantor will be released. So, also, if the creditor accepts a higher security for his claim, the merging of the lower into the higher security will work an extinguishment of the guaranty.

229. Rights of Surety or Guarantor. Neither guarantor nor surety have any rights against either party before the maturity of the original claim. At maturity the one conditionally held may pay the principal obligation and then enforce the claim against the debtor. He may collect all charges and items of cost in addition to the original claim. The chief rights are the following:

1. *Contribution.* Where several parties are conditionally liable on one debt and it is paid by one of them, he has a right to collect a pro rata share from each of the rest. This right exists only in regard to the amount of the original claim. It does not relate to additional charges, such as costs of trial. However, if a co-surety is sued on a claim, he generally asks that all of the sureties be made defendants, and then his rights to contribution will be fixed in regard to additional charges.

2. *Subrogation.* When a principal debt has been paid by one conditionally liable, he has a right to demand from the creditor all securities and evidences of indebtedness that may have been delivered to the creditor by the debtor.

230. *Notice.* The question of notice is not entirely settled. It is generally held that the surety is not entitled to notice and that he becomes absolutely liable when the debt is not paid at maturity. A guarantor is generally held to be entitled to notice within a reasonable time after default of payment. If he is not notified, he is held released to the extent of the detriment caused by not having notice. The safe way is to give notice in each case promptly, as in the case of an indorser.

231. RECAPITULATION

A suretyship or guaranty is a secondary agreement that a debt shall be paid on default of the principal.

A surety is one who makes his principal's debt his own debt.

A guarantor's undertaking is collateral to that of his principal.

A co-surety is one of several sureties.

A surety is released by payment of the debt, also by fraud, by act of the parties, such as special agreement, by diversion of fund, by compromise, and by release.

A co-surety or co-guarantor is entitled to contribution, also to subrogation.

A surety is not entitled to demand or notice.

A guarantor is entitled to demand and notice within a reasonable time after default of payment.

An indorser is entitled to demand at maturity and notice immediately thereafter.

232. QUESTIONS

Compare guaranty and surety. How many parties in each case? Name them. What has a consideration to do with such agreements? If the principal contract is made at one time and the guaranty at another what must be done to make the latter binding?

Explain the following: Special and general, limited and unlimited guaranty.

What distinction is made between a guaranty of payment and one of collection? When are such agreements negotiable and when not negotiable? How may a guaranty be terminated?

What effect have special agreements between debtor and creditor? Give examples. When is the guarantor or surety released, and when partially released? What effect has a release secured by the debtor from the creditor?

Explain the rights of surety or guarantor, their rights of contribution and subrogation. To what extent is notice binding?

233. DECISIONS BY THE COURTS

1. In *S v. S et al.*, 114 Ind. 453, the principal debtor tendered the full amount of a note at maturity. The creditor accepted \$240 in part payment and agreement with the debtor that he should retain the balance, paying interest thereon for one year. The sureties on the original note were sued for the balance. It was held that the contract made by the creditor and the principal, wherein the former, after accepting part payment of the debt, reloaned the latter the remainder of the money due, released the sureties. Sureties, as is well known, have a right to stand upon the letter of their contract, and if the creditor assumes to change the contract he releases them from liability. A creditor who does any act inconsistent with the terms of the contract, or prejudicial to the interests of the sureties, releases them. He impliedly contracts to accept the money when due, and by his refusal to do so, he loses his claim upon the sureties, for his act is injurious to them.

2. In *O v M*, 1 Heisk. 676, a note was given under duress and the father of the maker became surety under duress. The surety was held not liable. Fraud, misrepresentation, or duress will vitiate the contract of guaranty or suretyship and discharge the guarantor or surety.

3. In 46 S. W. Rep. 291, *Simmons*, the principal to a note, gave *Spencer*, one of the sureties, a mortgage to secure him against loss by reason of signing the note. It was held that this surety inured to the benefit of all sureties alike.

4. In the case of *M v. L. C. B.*, 149 U. S. 298, the evidence showed that a promissory note was executed and delivered, then indorsed by the

holder, and then guaranteed by six persons, and again indorsed by the holder. It was held that a guaranty of the payment of a negotiable promissory note written by a person upon the note before its delivery requires no consideration to support it, and need express none other (even where the law requires the consideration of the guaranty to be expressed in writing) than the consideration which the note upon its face implies to have passed between the original parties. But a guaranty written upon a promissory note, after the note has been delivered and taken effect as a contract, requires a distinct consideration to support it, and if such guaranty does not express any consideration, it is void, where the Statute of Frauds of that state requires the consideration to be expressed in writing.

5. In *K v. H*, 52 Pa. St. 525, it was said that in certain respects, the contract of a guarantor is to be carefully distinguished from that of a surety, for while both are accessory contracts, and that of a surety is in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings with notice that he will not continue bound unless they are instituted. *Cope v. Smith*, 8 S and R 110. By his contract he undertakes to pay if the debtor does not—the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt, the other an insurer of the solvency of the debtor. It results, as a matter of course, out of the guarantor's contract, that the creditor shall use due diligence to make the debtor pay, and failing in this he discharges the guarantor.

6. In 28 S. E. Reporter 50, Dunlap, Williams and Armstrong had signed a note as sureties for Olmand and Gray, and at the same time it was agreed that the note was to be discounted by Battey, cashier. Battey declined to take it, and indorsed it without recourse to a party who had knowledge of the facts and who discounted it. The fact that the party agreed upon to discount the note refused to do so, was held to release the sureties.

7. In *Ind. N. B. v. K et al.*, 93 N. Y. 273, the following contract of guaranty was introduced in evidence:

New York, Dec. 29, 1895.

Messrs. Brigham Bros.

Gentlemen: Any draft that you may draw on A. Feelstock of this city, we guarantee to be paid at maturity.

Kaufman & Blum.

A draft for \$15,000 drawn upon A. Feelstock by Brigham Bros., payable to the order of the Indiana National Bank, was not paid, and the bank sued Kaufman & Blum on the above guaranty. It was held to be a personal guaranty to Brigham Bros., and not assignable, and that the bank could not recover on it. The distinction between a general and a special

guaranty is that upon the former any person may advance money or incur liability, upon complying with its terms, and can recover thereon the same as though specially named therein, while in the latter the liberty of accepting its terms is confined to the persons to whom it is addressed, and no cause of action can arise thereon, except by their action in complying with its conditions. It is always competent for a guarantor to limit his liability as to time, amount or parties.

8. In *N v. K*, 28 La. An. 865, it was held that where a check was indorsed by the party as surety, it was understood that the party who gave the indorsement must have known that the check was not necessarily to be used at once. If so, the surety would not be released by failure to present payment at once. It bore evidence that the check was to be held until funds were available for its payment.

9. In *R v. Y*, 98 N. E. 813 (Ind.), one who signs a note or check in blank and delivers it to another, confers on the holder implied authority to fill in the blanks, and is bound by the check as filled in, if it pass to an innocent holder, though filled in contrary to the understanding of the parties.

10. In *C v. M*, 126 P 358 (Cal.), in an action by an assignee of warehouse receipts for the goods represented by them or their value, the exclusion of a chattel mortgage which was never delivered held not erroneous.

11. In *P v. S. B.*, 151 S. W. 873 (Tex.), a garnishee bank holding a balance to the credit of a debtor's general account, held not entitled to credit the same against the debtor's immatured notes to the bank as against plaintiff in garnishment.

12. In *R v. McL Estate*, 139 N. W. 50 (Mich.), an instrument by which decedent agreed to pay H \$10,000 for his interest in a corporation and certain patents, held not a note but in the nature of an executory contract, so that proof of consideration was essential.

13. In *B v. L*, 149 S. W. 211 (Tex.), where the drawer of a check knowingly makes it payable to a fictitious payee, it is considered payable to the bearer; but, if a real person is intended by the name of the payee, the check must be indorsed by that person, and payment by a bank upon indorsement of some unauthorized person is not binding upon the drawer.

234. HYPOTHETICAL PROBLEMS

1. A agrees to sell B 500 bushels of wheat at \$1.00 per bushel. B gives in payment his non-negotiable note. The note is delivered and also 250 bushels of wheat, but there is failure to

deliver the balance of the wheat. At maturity A demands payment of the note. Discuss rights of parties.

2. Same conditions as in 1, but the note is negotiable. Discuss rights of parties.

3. Compare negotiable and non-negotiable notes when but original parties are interested.

4. Write the note called for in No. 1. Name several ways in which the note may be made non-negotiable.

5. Same conditions as in 1, but the note is transferred to C without notice before maturity. C demands payment at maturity. Discuss rights of parties.

6. Same conditions as in 1, but the note is negotiable and is transferred to C as in 5. C demands payment at maturity. Discuss rights of parties.

7. Compare negotiable and non-negotiable notes when subsequent parties, as in 5 and 6, are interested.

8. Same conditions as in 1, but the note is negotiable and is transferred to C with notice. C demands payment at maturity. Discuss rights of parties.

9. Compare the rights of parties in the transfer of non-negotiable and negotiable notes, as in 5 and 8.

10. Same conditions as in 1, but the failure of consideration occurs after the transfer to C has been affected. C demands payment at maturity. Discuss rights of parties.

11. Same conditions as in 1, but the note is negotiable and is transferred to C without notice, then transferred to D who has notice. Discuss the rights of parties.

12. A is maker, B is payee of a note. It is transferred to C who indorses "without recourse" to D. At maturity D demands payment from A who sets up infancy. Discuss rights of parties.

13. A is maker, B is payee of a note. C, D, and E are holders through indorsements in regular order. The note is a foreign instrument and is dishonored by A at maturity. Discuss steps to be taken by last holder to fix liability of parties. Make out a set of papers such as are necessary in this case.

14. A is maker, B is payee of a note, C first holder. A pays part of note and receives a receipt for the payment, no indorsement is put on the note; after this D and E are holders in order through indorsements. At maturity E demands payment in full to which A objects, presenting his receipt. Discuss rights of parties.

15. A is drawer, B is drawee, C is payee, and D is indorsee of a draft. Discuss rights of parties.

16. Conditions as in 15. B accepts draft. Discuss rights of parties.

17. Conditions as in 15. B accepts draft, making it payable in a different city. Discuss the rights of parties.

18. Conditions as in 15. B accepts draft, making it payable out of the proceeds of a certain shipment. Discuss rights of parties.

19. Conditions as in 15, but it is a check. Discuss rights of parties.

20. Conditions as in 19, but A has the check certified before delivery. Discuss rights of parties.

21. Conditions as in 19, but D has check certified. Discuss rights of parties.

22. Compare 20 and 21 as to results.

23. The Central Cal. Co. is a corporation. A. A. Brown is President and W. F. Barnes is Secretary. The blank forms used for notes have the name of the corporation across the end. Each official adds the name of his office after his name. Write such a note.

24. Same as in 23. Many such notes have been issued and paid by the corporation. The corporation fails with something like one hundred thousand dollars of such notes outstanding. Suit is brought against Brown and Barnes individually with a view of compelling them to pay from their private property. Discuss rights of parties.

25. The following is issued "I, W. F. Barnes, hereby promise to pay O. E. Grant or order five hundred dollars." Is this a negotiable instrument?

26. Discuss the following: "Baltimore, Md. Mr. James Smith, Washington, D. C. My Dear Mr. Smith: Please pay Mr. R. W. White or order one hundred dollars for me, and greatly oblige Yours truly, W. P. Brown."

27. Discuss rights and liabilities of parties in following: "Chicago, Ill., Jan. 1, 1910, Mr. W. B. Stephens, Burlington, Iowa. Dear Sir: Please pay Mr. James Smith or order five hundred dollars when the foundation to house at 125 State St., Burlington, is complete according to specifications, also pay him one thousand dollars when the walls are complete and same are approved by the architect. Very respectfully, A. A. Brown."

28. "I. O. U. \$100.00, signed A. E. Brown." Is this a negotiable instrument? If not, what is its standing?

29. "I promise to pay A or order \$100 in potatoes." Is this negotiable or non-negotiable? Why?

30. "Pay B or order \$500.00 or less as then may be due." Is this negotiable? Discuss its standing.

31. "I promise to pay C or order \$750 when he is of age." Discuss its standing.

32. "\$100.00. Buffalo, N. Y., Jan. 1, 1910.

One month after date I promise to pay to the order of myself One Hundred Dollars.

(Signed) D. N. Williams."

This paper is indorsed by Williams, and at maturity is held and presented for payment by D. B. Bowman. Discuss liability.

33. One instrument reads "Pay B or bearer" and another one reads "Pay to bearer B." Is there any difference and if so what is it?

34. A forges B's name as drawer of a draft, naming himself as payee and C as drawee. C accepts this draft, and A indorses and transfers the draft to D for value, etc. D demands payment at maturity. C now knows of the forgery. Discuss rights of parties.

35. Conditions as in 34, but A raises a draft drawn by B from \$100.00 to \$1,000.00. Discuss rights of parties.

36. A signs and delivers a blank note to B, with instructions to buy a certain horse, directing him to fill in the amount. B instead fills in the amount for \$500.00, naming himself as payee, and negotiates the note to C, who demands payment at maturity. Discuss rights of parties.

37. Two notes in part read as follows: One, payable in five years with interest at 6 per cent per annum; the other, payable in five years with interest at 6 per cent payable yearly. Discuss.

38. A owes B an amount \$150, later he gives B his note for the amount payable in six months. Of what is this transaction an illustration? Continue the illustration to a still higher security.

39. C owes D \$500, on open account contracted on June 2, 1903, due in seven months without interest; on September 1, 1905, C pays the interest due on the account; on July 15, 1906, he pays \$100 on account; on December 15, 1906, he leaves the state and returns on March 1, 1907. What is the last day upon which suit can be brought by D against C in your state and for what amount?

40. E owes F \$175 due now, and F owes E \$150 due to-day. F brings suit against E for the amount due him. Discuss rights of party.

235. CONSTRUCTION WORK

In drawing the following described instruments use slips of paper $3\frac{1}{2}$ inches by 8 inches, or write three on a sheet of paper commercial size, or four on a page of foolscap. Separate with a ruled line. The student will write the word "Specimen" (in red ink, if convenient) across the face of each paper he writes. Except where otherwise directed, use the following data: date, the present; time, thirty days; amount, \$100; payee, A. A. Brewer; maker or drawer, student; drawee, L. J. Madison. The teacher will supply additional data.

1. Draw a promissory note containing only the essentials.
2. Draw a note bearing interest.
3. Draw a promissory note bearing interest payable at a particular place.
4. Draw a joint note making it payable any time within one year.
5. Draw a joint and several note.
6. Draw a note payable to two payees, not partners.

7. Draw a note showing the maturity as a part of the body of the instrument.

8. Draw a judgment note, short form.

9. Draw a collateral note using notes number 3 and 4 as collateral, Jas. G. Holland as maker.

10. Indorse No. 1 in full to A. N. Palmer.

11. Indorse No. 2 with restrictive indorsement to W. F. Slocum.

12. Indorse No. 5 with the following indorsements: In full to A; full waiver to B; full qualified to C; full conditional to D; restrictive to E.

13. Draw a sight draft.

14. Draw a draft at so many days sight.

15. Write acceptance to No. 14.

16. Draw a time draft at so many days after date.

17. Write acceptance to No. 16.

18. Draw a ten days' draft and place five indorsements on it as follows: 1st in full, 2d full qualified, 3d full waiver, 4th in full, 5th blank. The holder presents the draft for acceptance and it is dishonored. Make out the protest papers and a notice for each party conditionally liable. The day following two parties offer to accept the draft, one for the honor of the drawer and one for the honor of the first indorser. Write the acceptances.

On the due date the draft is presented for payment and is again dishonored. Make out protest and send proper notices.

19. Draw a check. Have it certified. (Use rubber stamp if one is available.)

20. Draw a set of three bills of exchange on London. Have one of them accepted.

21. Draw a cashier's check.

22. Draw a traveler's check for \$100, showing its value in London (pounds); Paris (francs); Berlin (marks).

23. Draw a bank draft and indorse it in full to R. E. Grant & Co.

24. Draw a note, making it payable in merchandise from your store. Is it negotiable?

25. Draw an I. O. U.

26. Draw a sight draft, directing that it be charged to the proceeds of a certain shipment of potatoes.

27. Draw a note for \$1,000, making it payable in ten equal monthly payments.

28. Draw a receipt reciting payment in full of a claim not yet due.

29. Draw a note signing as agent, but so worded as to assume no personal liability.

30. Draw a note to be signed by three trustees of a church. They are to assume no personal liability.
31. Draw a draft and attach to it a properly indorsed bill of lading.
32. Draw a note with the following indorsements: A, B, C, D and E. The paper being now in the hands of F who elects to erase C's indorsement. What effect will this have?
33. Draw a note and the following indorsements: A, B, C, D, E, and C, the C's being identical. F is the holder who has had the paper protested for non-payment. He collects from C. Discuss C's rights.
34. Draw a draft on two independent drawees at ten days' sight.
35. Show three transfers by indorsement on No. 34, and have the draft properly accepted.
36. Draw three notes, one payable on the death of a certain party; one payable on the arrival of a certain steamship at a certain port, and one payable on the 21st birthday of a certain third party. Discuss the standing of these three notes.
37. Draw a check payable to E. L. Coe, Treasurer Sloan Mfg. Co. Indorse it W. H. Jones, Treasurer, Sloan Mfg. Co. Is this paper regular?
38. Draw the following note, amount in figures \$325.60, amount in words Three Twenty-five and 60/100. Interpret the paper.
39. Draw a note signed by principal and surety and one independent indorser.
40. Draw a note. It is signed as follows: "Ed T. Taylor, agent of J. M. Smythe & Co." Discuss the liability of parties.
41. Draw a note payable to two independent payees and have it properly indorsed in full.
42. Draw a certificate of deposit, interest five per cent.
43. Draw a set of exchange and indorse them to two separate payees. Discuss relationship.
44. Draw a note for \$1,000 interest at six per cent, indorse in full to A. Indorse payment of \$100; transfer by full qualified indorsement to B. Indorse payment of \$500; transfer by full indorsement to C.
45. Draw a note—address—date—time 30 days—amount \$250—payee your name—signed R. G. Bayard, Treas. Hide & Leather Co. It is held in *S v. H*, 59 Maine 172, and in *D v. E*, 141 Mass. 590, that the above is the personal obligation of Bayard, and that the use of Treas. Hide and Leather Co. is but an added description of Bayard, as it were, to distinguish him from some other Bayard. A signature binding the Hide & Leather Company would be:

Hide & Leather Co.

By R. G. Bayard, Treas.

46. Draw a note—address, date, time 4 mos.; to order of the maker; amount \$1,000; signed Brown Jones & Co.; indorsed by American Tobacco Co., by J. W. Mattes, Pres. The note is offered for and is discounted at bank by payee. It is held, in 116 N. Y. 281, that the indorsement is worthless as corporation officer cannot bind the corporation by an accommodation indorsement.

47. Write a guaranty limiting as to parties, amount, and time.

48. Rewrite the guaranty given in Decided Cases, page 210, No. 7, changing it from a special to a general guaranty.

236. SEARCH QUESTIONS

Since the Negotiable Instrument Act has been passed in a large majority of States, the student is directed to a careful perusal of that act. The heading of each section is indicative of its character and therefore may be changed to a question. The principal object of the passing of the law has been to secure uniformity throughout the United States. As previously stated, it is not intended to change the law merchant, but to clear up differences of opinions as shown in decisions in different jurisdictions, and to eliminate some of the peculiar statutory enactments found in some of the States.



JAMES KENT

JAMES KENT (1763-1847)

A celebrated American jurist, educated at Yale College, admitted to the bar in 1785, professor of law Columbia College, 1794-98. Later was Master in Chancery, member of the legislature, recorder, judge of the Supreme Court, Chief Justice, and Chancellor of New York. In 1823 again entered Columbia. From his lectures and writings grew the *Commentaries of American Law* (four large volumes). As chancellor he rendered his greatest service to American jurisprudence. Johnson's Chancery Reports (Kent's Decisions), published in seven volumes, cover a wide range of subjects and furnish the basis of equity jurisprudence. Kent's writings and decisions are classics in American law.

CHAPTER XXX.

SALE OF PERSONAL PROPERTY

237. INTRODUCTION

238. ELEMENTS

1. Parties
2. The Contract
3. The Memorandum
4. Part Payment
5. Part Delivery
6. Price
7. Subject Matter
8. Property

239. OTHER RELATIONSHIPS

240. RECAPITULATION

241. QUESTIONS

237. Introduction. This subject—which is a division of the subject of contracts—deals with that large class of property transactions which go to make up the great commerce of the world. It includes the contract of bargain and sale and the agreement to sell. In each case the seller agrees to convey a title; in one, the transfer takes place immediately, and in the other at some future time. The transfer of title must be for a money consideration. If the parties simply give one commodity for another the transaction is a barter or an exchange.

238. Elements. The general elements found in contracts control here, parties, subject matter, consideration, and agreement.

1. *Parties.* The parties must be legally capable of entering into the contract of sale. The seller must be the owner of the

thing sold, capable of delivering title, or he must be an agent having power to sell.

BILL OF SALE

Know all Men by these Presents,

THAT _____ I, Samuel Brown _____ of the _____ City of Cedar Rapids _____ in the County of _____ Linn _____ and State of _____ Ohio _____ party _____ of the first part, for and in consideration of the sum of _____ One thousand _____ Dollars, lawful money of the United States of America, to — me — in hand paid, at or before the en-sealing and delivery of these Presents, by _____ Thomas Johnson, party _____ of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and delivered, and, by these Presents, does grant, bargain, sell, and deliver, unto the said party _____ of the second part, all the following GOODS, CHATTELS, and PROPERTY, to wit:

1 seven-year old gelding known as "Duke" _____

1 eight-year old gelding known as "King" _____

1 set double harnesses, silver plated _____

1 Studebaker buckboard _____

To Have and to Hold the said goods, chattels, and property unto the said party _____ of the second part, — his — heirs, executors, administrators, and assigns, to and for — his — own proper use and behoof, forever.

And the said party _____ of the first part does vouch — himself — to be the true and lawful owner of the said goods, chattels, and property, and have in him — full power, good right, and lawful authority, to dispose of the said goods, chattels, and property, in manner, as aforesaid: And — he — does for — his — heirs, executors, and administrators, covenant and agree to and with the said party _____ of the second part, to Warrant and Defend the said goods, chattels, and property to the said party _____ of the second part, — his — executors, administrators, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

In Witness whereof, we have hereunto set our hands and seals the _____ first _____ day of _____ February _____ in the year one thousand nine hundred and thirteen _____

Sealed and Delivered in the Presence of _____

Samuel Brown

Seal

Seal

The buyer of a chattel from one not having title or power to sell does not, as a general rule to which there are few exceptions, get a good title. The seller as a rule conveys no better title than he himself possesses. But possession of personal property is evidence of ownership, and consequently of the right to sell. There is a distinction between possession and ownership that must be kept in mind. One may be in possession and not be the owner. The possession may have been obtained fraudulently, and it is possible for one in such possession, by virtue of what is known as estoppel, to sell and convey a good title to another, an innocent purchaser.

If the seller has no title, he can as a rule convey none, but if he has a voidable title, it may be possible for him to transfer a perfect title to another, as, where one who having no knowledge of the defect buys in good faith.

2. *The Contract.* Reference should be made to the section of the Statute of Frauds relating to the sale of goods. (See page 43.) Three conditions are presented—a compliance with the statute, to pay a part of the purchase price, or to deliver a part of the goods by way of earnest.

3. *The Memorandum.* The statute requires in the absence of part payment or earnest, some note or memorandum signed by the party to be charged. It is not necessary that the memorandum be in contract form, and, in fact, the note or memorandum is not a contract; it is merely evidence that enables the contract to be established. The writing should contain all of the terms. The seller and buyer should be identified, and the price, time of payment, and description of the property should be certain. The essentials of a general contract should appear. No formality in the drawing of the note or in its structure is necessary. While the memorandum has not the dignity of a written contract, the general rule of evidence relating to written contracts is applicable.

4. *Part Payment.* A usual way to avoid the necessity of reducing the agreement to writing is to make a part payment of the purchase price. This part payment must be something of

value, not necessarily money. A promise to pay is not sufficient, nor is it a tender. A promise to pay to a third party who is a creditor of the seller is sufficient, if acceptable to the creditor. Some states by statute require that the payment be made at the time of the making of the contract.

5. *Part Delivery.* A part delivery of the goods sold is held sufficient to take the sale requirements out of the operation of the Statute of Frauds. The part delivered must be honestly made with the intention of transferring the absolute title to the whole quantity, and the part delivered must be of such a quantity as to lessen the amount to be delivered at a later date.

6. *Price.* The price must be a money consideration. It is what distinguishes a sale from mere trade or barter, and also from a gift. Adequacy of price is not essential; it is sufficient if the parties have agreed on a price. Barter is the exchange of one commodity for another, and is one of the earliest forms of contract. A gift is a transfer of title to a chattel without consideration. To be effective, a delivery of the chattel must be made. If the giver thereby deprives himself of the ability to pay his debts, the transfer may be set aside as fraudulent by an injured creditor. This is not so in case of a *bona fide* sale, or a barter of even exchange. When no price has been stipulated by the parties, the law presumes a reasonable price was intended, which is usually the market price.

7. *Subject Matter.* While formerly the subject matter of a sale did not include all kinds of personal property, there is little doubt that now any kind of personal property may be the subject matter of a sale. The English rule defined goods as all chattels personal other than money and choses in action. An earlier rule declared that only things capable of larceny could be the subject matter of a sale. Money was not considered as subject to bargain and sale.

8. *Property.* Property must be in existence in order to be sold. If it has ceased to exist, unknown to either party, the sale fails. If an article has been paid for and then is destroyed before

the delivery is legally complete, the sale also fails. An agreement to sell goods not yet in existence, or to be manufactured, is not a sale but an agreement to sell. One may, in the absence of statutory prohibitions, sell all that he lawfully possesses. He may also enter into an agreement to sell what he does not yet possess or what he may hereafter possess.

To make a valid sale, the seller must be the owner, or authorized by the owner, in order to sell. The true owner is one who has undisputed title to the thing and also has the right to demand possession.

239. Other Relationships. As there are a number of relationships that may be assumed by parties relative to property, it may not be amiss to define these various phases.

A *sale* is the transfer of property from one person to another for a valuable consideration, and passes the title.

A *pledge* or *pawn* is a delivery of goods to another as a security for a debt or other obligation. The possession passes but the title does not.

A *mortgage* is the transferring of the title to another as a security. The title passes conditionally; the possession may or may not pass; generally it does not.

A *lien* is the right to hold another's property, coupled with possession, until some specific charge has been satisfied.

The question of ownership must be determined in order to locate properly where loss is to fall, in case the goods are destroyed. As a general proposition, it may be said that the loss falls upon the one holding the title, provided due care has been exercised by all persons concerned.

240. RECAPITULATION

Sale is a part of the general subject of contracts. In it are found the same general elements and the same underlying principles. There must be competent parties, proper subject matter, a valid consideration, and a meeting of minds.

To comply with the Statute of Frauds, a note or memorandum of the sale should be signed by the party to be charged. Compliance with the

statute may be dispensed with by payment of part of the purchase price, or by delivery of part of the goods.

The price must be a money consideration. If goods are exchanged for goods the transaction is an exchange or a barter. A transfer of title without consideration is a gift; but delivery of the chattel is essential. Where no price is stipulated, a reasonable price or market value is presumed.

All kinds of personal property may be the subject of sale. If the property has ceased to exist, the sale fails. If it is destroyed before delivery is legally complete, the sale likewise fails.

A *pledge* is a delivery of goods as a security. Possession passes but title does not.

A *mortgage* is transfer of title to another as a security. The possession generally does not pass.

A *lien* is a holding of property to secure the performance of a specific promise.

An *innocent purchaser* is one who pays a valuable consideration without notice of other persons' rights or of defects in the seller's title.

241. QUESTIONS

What are the elements to be considered in contracts of sale? What are the requisites as to parties? Distinguish between possession and ownership with reference to capacity to transfer title.

What provisions of the Statute of Frauds must be complied with in sales of personal property? What should the "Memorandum" contain? What is the purpose and operation of "part payment"? What is the purpose and operation of "part delivery"? What are the requisites of price in a sale?

What is barter? What is a gift? What things may be the subject matter of a sale?

State some instances in which a sale may fail. Define sale; pledge; mortgage; lien.

What is the difference between a sale and an agreement to sell?

What is the distinction between a sale and a pledge? A sale and a mortgage? A sale and a lien? Of what significance is the location of the title?

CHAPTER XXXI.

DELIVERY OF PROPERTY

242. INTRODUCTION

1. What Delivery Is
2. Where Something Remains to be Done
3. Sales of Goods and Contracts for Labor
4. Bargain and Sale
5. Contract to Sell

243. RECAPITULATION

244. QUESTIONS

242. Introduction. So far as the buyer and seller are concerned, the sale is complete when the agreement is complete, and delivery is not necessary. A sale without delivery, however, is looked upon unfavorably by the law, as it presents possibilities of defrauding third parties. If A sells a horse to B, and still, with B's consent, retains possession, holding himself out as owner, C, an innocent third party, may be led to believe that A is the owner and buy the horse and take possession. In such a case C obtains a good title, and the first sale is held void since no delivery was made. But B may recover the price paid.

1. *What Delivery Is.* This is a question of importance. Delivery can only be made of specific goods. If goods are sold and destroyed before delivery is made, the loss falls on the seller; but if delivery has been made, the loss falls on the buyer. Delivery has been effected whenever the buyer exercises ownership or control of the goods. When the buyer exercises ownership all title ceases in the seller, and any relationship that he may exercise thereafter toward the goods is that of care taker. When the seller has performed his part of the contract, the title passes to the purchaser, together with the attendant losses. If A sells grain to B and it is measured and set aside in accordance with B's

instructions and the grain is then destroyed by fire, the loss falls upon B because the grain has been delivered.

2. *Where Something Remains to Be Done.* When goods are sold, a counting, a measuring, or certain work to be performed by the seller is frequently necessary before the buyer can take possession. Suppose a merchant sells one hundred barrels of sugar out of a stock, these must be counted and set aside; or he sells one hundred bushels of wheat from a bin, the wheat must be measured. Until these things are done, the title does not pass. Chancellor Kent gives the following test: "If anything remains to be done as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer."

3. *Sales of Goods and Contracts for Labor* should be carefully distinguished. If the transaction is a sale, the requirements of the Statute of Frauds must be complied with; if it is a contract for labor, the statute is not applicable.

4. *Bargain and Sale.* The requisites of a sale are five in number, namely, (1) that the agreement be binding in form, (2) that the property be in existence, (3) that the seller be the owner or have authority to sell, (4) that the property be specific, and (5) that the sale be for money. The title to the property in a bargain and sale passes at once—as soon as the contract is complete.

5. *Contract to Sell.* This is an agreement entered into by which one agrees to sell and deliver to another at a future time property already in existence or which by the result of labor is to be made ready for delivery at the agreed future time. There are two requisites, (1) that the agreement be legally binding, and (2) that the sale be for money.

243. RECAPITULATION

A sale is complete when the agreement is complete, but a sale without delivery is not looked upon favorably by the law since it presents opportunities for fraud. Delivery is usually made by manual transfer or setting aside, and is complete when the buyer exercises his rights

of ownership. A contract for labor does not fall within the operation of the Statute of Frauds.

The requisites of a bargain and sale are a binding agreement, subject matter in existence, authority to sell, identification of property, and a money consideration.

The requisites of a contract to sell are a binding agreement and a money consideration.

244. QUESTIONS

When is a sale complete? Give an instance in which a sale may be void for want of delivery.

Discuss the question of loss when goods are destroyed both before and after delivery.

Mention a distinction between a sale of goods and a contract for labor.

What are the requisites of a sale? What are the requisites of a contract to sell? What is the difference between a sale and a contract to sell?

CHAPTER XXXII

SALES WITH CONDITIONS

- 245. CONDITIONAL SALES
 - 1. On Trial
 - 2. Sale or Return
 - 3. Sale by Sample
- 246. CHATTEL MORTGAGE
- 247. WARRANTIES
 - 1. Express
 - 2. Implied
- 248. CAVEAT EMPTOR
- 249. RECAPITULATION
- 250. QUESTIONS

245. Conditional Sales. 1. *On Trial.* Sales on trial are conditioned upon giving satisfaction for a definite time after trial. The buyer receives the goods and after subjecting them to certain tests satisfies himself as to their quality. If the seller's representations have been verified by the trial, a sale is the result; if not, the buyer is at liberty to return the goods, but this must be done before the expiration of the agreed time. Title does not pass at time of delivery; it passes, if at all, when the conditions have been fulfilled.

Sales are sometimes made whereby the purchaser is not to acquire title until some condition precedent has been complied with. Generally this condition is payment. The goods may be delivered and payments made by installments, the title remaining in the seller until the last payment has been made. As between

seller and buyer, there can be no question as to the fairness and honesty of such a deal. When, however, the rights of an innocent third party intervene, the question is more difficult. The different state courts are not uniform in ruling on the question, some holding that the original seller must be protected, while others favor the innocent purchaser.

2. *Sale or Return.* This may be a sale, and if so the title passes at the time of transferring the possession of the chattel. However, as a part of the agreement, the buyer has the right to return or re-sell the article to the first owner in the event of certain contingencies. But if the title does not pass, it is a contract to sell on trial. In the first case the loss of the chattel if destroyed falls on the buyer, while in the second case it falls on the seller.

3. *Sale by Sample.* A common way of selling goods is to give a small quantity to the buyer for his inspection. The understanding is that the bulk shall equal the sample as to quality. There is no undertaking as to the quality or grade of the sample, simply that the sample is a fair representation of the bulk.

If goods are sold by description, the goods must be as described or the buyer may refuse to receive them.

When sales are made conditional upon some event or quality, the buyer may refuse to accept the goods unless the condition is complied with.

246. Chattel Mortgage. A chattel mortgage is a conveyance of the title to personal property as security for the payment of a debt or the performance of a promise. In a chattel mortgage the title is legally transferred, but it is usual for the seller to retain possession of the goods. It is customary to give a note for the debt, and the chattel mortgage is given as security for the payment of the debt. When the note or debt is paid the mortgage is of no force. Statutory law requires the registration of a chattel mortgage. If the debt is not paid at the stipulated time the law provides a regular way by which the property described in the mortgage may be sold upon foreclosure to satisfy the debt.

CHattel Mortgage

Know all Men by these Presents,

THAT I, William B. Roswell _____
 of the Town of _____ Austin _____ in the County of _____ Cook _____ and
 State of _____ Illinois _____ in consideration of the sum
 of _____ One Thousand _____ Dollars
 to _____ me _____ paid by _____ George Bowman _____
 of the County of _____ Cook _____ and State of _____ Illinois _____ the
 receipt whereof is hereby acknowledged, do _____ hereby GRANT, SELL,
 CONVEY and CONFIRM, unto the said _____ George Bowman _____
 and to _____ his _____ heirs and assigns, the following GOODS AND
 CHATTELS, to-wit: _____
 10 head cattle, 6 horses, 90 sheep and 10 hogs, now on the
 Riverside Farm in the township of Vernon _____

To Have and to Hold All and singular the said Goods and Chattels, unto
 the said Mortgagee _____ herein, and _____ his _____ heirs, executors,
 administrators and assigns, to _____ him _____ and their sole use, FOREVER.
 And the Mortgagor _____ herein, for _____ himself _____ and for _____ his _____
 heirs, executors and administrators, do es hereby covenant to and with the said
 Mortgagee _____, _____ his _____ heirs, executors, administrators and assigns,
 that said Mortgagor _____ is _____ lawfully possessed of the said Goods and Chattels,
 as of _____ his _____ own property; that the same are free from all encumbrances,
 and that _____ he _____ will, and _____ his _____ executors and administrators
 shall, warrant and defend the same to _____ the said Mortgagee _____,
 _____ his _____ heirs, executors, administrators and assigns, against the lawful
 claims and demands of all persons.

Provided, Nevertheless, That if the said Mortgagor _____, _____ his _____
 executors or administrators, shall well and truly pay unto said Mortgagee _____,
 _____ his _____ executors, administrators or assigns, _____ the sum of one
 thousand dollars, according to the terms of a certain promissory
 note this day executed and delivered to the said George Bowman, _____
 which note together with the interest thereon is due and payable
 on the fifteenth day of August nineteen hundred and fourteen, _____
 then this Mortgage is to be void, otherwise to remain in full force and effect.

And, Provided, also, That it shall be lawful for the said Mortgagor _____,
 _____ his _____ executors, administrators and assigns, to retain possession of the
 said GOODS AND CHATTELS, and at _____ his _____ own expense, to keep
 and use the same, until _____ he _____ or _____ his _____ executors, administrators
 or assigns, shall make default in the payment of the said sum of money above
 specified, either in principal or interest, at the time or times, and in the manner

hereinbefore stated. AND the said Mortgagor....., hereby covenant..... and agree..... that in case default shall be made in the payment of the Note..... aforesaid, or of any part thereof, or the interest thereon, on the day or days respectively on which the same shall become due and payable; or if the Mortgagee....., — his — executors, administrators or assigns, shall feel — himself — insecure or unsafe, or shall fear diminution, removal or waste of said property; or if the Mortgagor..... shall sell or assign, or attempt to sell or assign the said Goods and Chattels, or any interest therein; or if any writ, or any Distress Warrant, shall be levied on said Goods and Chattels, or any part thereof; then, and in any or either of the aforesaid cases, all of said Note..... and sum of money, both principal and interest, shall, at the option of the said Mortgagee....., — his — executors, administrators or assigns, without notice of said option to anyone, become at once due and payable, and the said Mortgagee....., — his — executors, administrators or assigns, or any of them, shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the Mortgagor....., with or without force or process of law, wherever the said Goods and Chattels may be, or be supposed to be, and search for the same, and if found, to take possession of, and remove, and sell, and dispose of the said property, or any part thereof, at public auction, to the highest bidder, after giving — thirty — days' notice of the time, place and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice, for cash or on credit, as the said Mortgagee....., — his — heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect; and, out of the money arising from such sale, to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising, and selling such Goods and Chattels, and all prior liens thereon, together with the amount due and unpaid upon said Note....., rendering the surplus, if any remain, unto said Mortgagor....., or — his — legal representatives.

Witness, The hand..... and seal..... of the said Mortgagor....., this — fourteenth — day of — August — in the year of our Lord one thousand nine hundred thirteen

Scaled and Delivered in the Presence of

W. G. Gerber

William B. Roswell Seal

F. E. Albright

Seal

RELEASE OF CHATTEL MORTGAGE

Know all Men by these Presents, That George Bowman of the County of Cook and State of Illinois DO HEREBY CERTIFY, That a certain indenture of Mortgage, bearing date the fourteenth day of August A. D. 19 13, made and executed by William B. Roswell of the first part to George Bowman of the second part, conveying certain personal property therein mentioned as security for the payment of one thousand Dollars and — cents as therein stated and recorded in the Recorder's Office of Cook County, in the State of Illinois in Book B of Series A on page 24 on the fifteenth day of August A. D. 19 13 is, with the note accompanying it, and the aforementioned debt fully paid, satisfied, released, and discharged.

Witness, my hand and seal, this fifteenth day of August A. D. 19 14.

George Bowman

Seal

Seal

State of Illinois } ss. H. L. Klein
Cook County. }

a notary public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY, that George Bowman personally known to me to be the same person, whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given, under my hand and official seal, this fifteenth day of August A. D. 19 14.

H. L. Klein

Notary Public



247. Warranties. A warranty is an undertaking on the part of the seller that the goods possess certain qualities. The distinction between a condition and a warranty is that the former may suspend, rescind, or modify the principal obligation, while the latter is a separate or additional undertaking on the part of the vendor.

“A warranty is a separate, independent, collateral stipulation on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact relating to the thing sold.”

As to whether a stipulation is a condition or a warranty, depends largely upon the intention of the parties. Any stipulation may be made a condition precedent to the passing of title, or it may be agreed to be a warranty. Warranties are classed as express and implied.

1. *Express.* Warranties are express when the collateral undertaking is fully understood as being an undertaking in part for the consideration. It must enter into and form part of the agreement; that is, it must be an inducement in bringing about the contractual relationship. If the party to whom the warranty is made knows that statements thereto are untrue, the warranty will be of no force. The expression of an opinion as to certain qualifications an article possesses is not ordinarily a warranty, nor are commendatory statements made by a salesman to be construed as warranties. The warranty, to be valid, must be made at the time the contract is made. However, an agreement of warranty entered into subsequent to the making of the original contract will be valid if a distinct consideration is given for it.

2. *Implied.* An implied warranty is a warranty not expressly stated at the time the original contract is made, but from circumstances it is presumed to have been taken into consideration in the contract formation. The seller of goods impliedly warrants that he has title and authority to sell. If the seller has no title, having received the goods innocently or otherwise from another, he conveys no title; the buyer may return the goods and

demand the return of the purchase price; he may also do so if he is deprived of possession by the lawful owner.

The seller of provisions also impliedly warrants that they are wholesome and fit for domestic use.

248. Caveat Emptor. This is a rule of wide application, "Let the buyer beware." The purchaser must, when he has the opportunity, rely largely on his judgment. Defects of a patent nature are not covered by a warranty, but latent ones are covered by an express warranty.

249. RECAPITULATION

In sales on trial title does not pass until all tests and conditions have been fulfilled.

In sales by sample the distinguishing characteristic is that the bulk shall be of the same grade or quality as the sample.

A chattel mortgage is a conditional transfer of title given as a security for the discharge of a note or other obligation.

Upon payment of the debt the mortgage is discharged and released, and upon a failure to pay the mortgage it may be foreclosed and the property sold to satisfy the debt.

A warranty is an undertaking by the seller that the goods possess certain qualities. A warranty is express when it is fully understood as being an undertaking in part for the consideration. It is implied when, although not expressly stated at the time of making the contract, it is presumed from the circumstances that a warranty has been taken into consideration.

The rule of caveat emptor ("let the buyer beware") is that the purchaser buys at his own risk.

For a breach of warranty, the purchaser may bring suit for damages.

250. QUESTIONS

Discuss "sales on trial." What are the rights of a purchaser in "a sale or return"? What are the conditions of a sale by sample?

Discuss the rights of the parties under a chattel mortgage.

What is a warranty? Distinguish between a warranty and a condition. When is a warranty express? When implied?

What is the doctrine of *caveat emptor*?

When do you return goods and when do you sue for damages?

CHAPTER XXXIII

RIGHTS OF PARTIES

251. SELLERS

1. Stoppage in Transit
2. Sale

252. RIGHTS OF BUYERS

1. Specific Performance

253. BREACH OF CONDITIONS

254. BREACH OF WARRANTY

255. RECAPITULATION

256. QUESTIONS

257. DECISIONS BY THE COURTS

258. HYPOTHETICAL PROBLEMS

259. SEARCH QUESTIONS

251. Sellers. The seller's first right is to demand payment as a condition precedent to the delivery of the goods. If the goods have been delivered he has a claim against the buyer personally, for the debt. If the possession has not been transferred to the buyer the seller has the right to a lien, i. e., to retain possession till payment is made. In order to exercise the right of lien, payment for the goods must be due, for if credit has been given, the seller has no right to hold the goods. If payment in part has been made and the balance is due, the seller may hold part or all of the goods for the balance due. He has not the right to hold, on an old balance of account, particular goods that have been paid for. The merchant's right of lien is the right to hold goods for claims and charges on those particular goods.

1. *Stoppage in Transit.* This is an extension of the right of lien. As long as goods are in the hands of a common carrier

or warehouseman, who receives them from the seller, they are constructively under the control and direction of the seller. Three conditions are necessary for the proper execution of this right by the seller: (1) there must be a balance due on the goods; (2) the goods must be in the hands of an intermediate party; (3) the buyer apparently must be in financial difficulties.

A, of New York, sells B, of Chicago, a bill of goods on sixty days' credit. The goods are receipted for by the New York Central Railway Company. The day following the shipment A learns that B has failed in business. A immediately sends a notice to the Railway Company in New York, directing it to hold the goods subject to his order and not to deliver the goods to B. The three conditions have been complied with and A has regained constructive possession. The financial difficulty of B need not go to the extent of bankruptcy; a failure to pay paper due is sufficient. If in the above case B had given personal directions to the common carrier or exercised ownership prior to shipment, A could not have exercised the right of stoppage in transit. When stoppage has been effected, the buyer has the right to tender the price and demand the goods.

2. *Sale.* The exercising of the right of lien or stoppage in transit does not affect the contract or the passing of title. In either case the seller must be given a proper remedy to enforce his rights. Such a one is furnished him in the right to re-sell the goods and hold the buyer liable personally for any deficit. If the goods sell for more than the purchase price and charges, the difference is to be paid to the buyer.

252. **Rights of Buyers.** So far we have discussed the rights of the seller. The principal right of the buyer is the right to demand possession of the goods, subject, however, to any condition precedent. If the goods are sold for cash, he must first make tender before demanding possession.

1. *Specific Performance.* In very exceptional cases the right of specific performance of the contract may be enforced by the buyer; but as a rule he must satisfy himself by a claim for

damages. Thus, if he can show that these particular goods are not only necessary but are the only available ones, specific performance may be had. So, if the article is one of an historical nature, as an heirloom, the loss of which could not be compensated by money, the purchaser may have specific performance of the contract.

253. Breach of Conditions. A condition may be contained in the contract and, if violated, the contract may be treated as at an end, and the buyer is not obliged to receive the goods; if they have been delivered, he may return them or even refuse to exercise ownership over them. This rule is equitable and works in favor of either party. The injured party has a claim against the wrongdoer for damages.

254. Breach of Warranty. It must be kept in mind that a warranty is a separate contract, the breach of which does not avoid the sale unless fraud can be shown. The buyer is not at liberty to return the goods but must seek his remedy in damages. The claim for damages operates as a recoupment against the selling price if not paid, and as a personal claim if payment has been made.

255. RECAPITULATION

The first right of the seller is to demand payment as a condition precedent to delivery.

Stoppage in transit is the right of the seller to take the goods before final delivery. Three things must co-exist as conditions precedent to the exercise of the right: (1) There must be a balance due; (2) the goods must be in the hands of an intermediate party; (3) the buyer must be in financial difficulties.

The right of lien or stoppage in transit does not affect the operation of the contract; title passes notwithstanding. In cash sales the buyer may tender payment and demand possession.

Specific performance is the right to enforce the carrying out of the contract in accordance with its terms.

For a breach of a condition the contract may be treated as at an end and the goods returned.

256. QUESTIONS

What are some of the seller's rights? Illustrate stoppage in transit.

What are the respective rights of seller and purchaser where goods have been stopped in transit? What are some of the rights of the purchaser?

When may specific performance be had? How does a breach of condition affect a contract of sale? A breach of warranty?

257. DECISIONS BY THE COURTS

1. In *H v. H*, 38 Pa. 491, a sale is a contract between parties to pass title to property for money which the buyer pays or promises to pay to the seller for the thing bought and sold, and is to be controlled by the intention of the parties.

2. In *W v. D*, Fed. No. 17612, the transfer of personal chattels is governed by the law of the owner's domicile if the contract of transfer was made there, though the chattels may be, at the time, in another state, by the laws of which the transfer would be void.

3. In *R v. H*, 59 Ala. 977, things not in esse (being) actual or potential, cannot be the subject of sale, although they may be the subject of an agreement to sell.

4. In *B v. H*, 4 S. C. 151, a contract of sale will not be set aside merely for inadequacy of price, unless the inadequacy is so great as to furnish proof of fraud or undue advantage.

5. In *F v. H*, 26 Vt. 452, in a sale, what is termed "giving a refusal" of property to a party, who may take it or not, within a certain time, unless upon some other consideration, or under seal, is not a valid contract in law, for want of consideration.

6. In *F v. D*, 35 W. Va. 337, where one sends goods to another, as on a sale, and the latter disclaims to have purchased them, but permits a third person to take them and convert them to his own use, he will be liable as purchaser; and this, notwithstanding he may have allowed them to be taken by mistake.

7. In *B v. L*, Fed. No. 1362, a mistake without bad faith, made in the description of the brand on flour barrels, does not essentially change the substance of the flour so as to render void the sale. When the sale note described the flour as "Hoxall," whereas it was branded "Gallegs," the sale was not avoided.

8. In *Z v. K*, 16 Ind. 290, to entitle a buyer to defend successfully on the ground of fraudulent representation by the seller, the representation must be false; must have been known to be false by the seller at the time it was made; must be in regard to a material part of the contract, and be relied on by the buyer.

9. In *S v. W*, Fed. No. 12887, where tobacco in kegs is sold and is partly opened for inspection, and more is offered to be opened, and the quality turns out to be worse than either party supposed, the vendor is not liable for fraud.

10. In *McM v. C*, 48 Kans. 263, where a bill of sale containing a warranty of title has been given, all oral statements made previous to the giving of such bill of sale, concerning the transaction, are inadmissible, unless fraud is shown.

11. In *H v. F*, 46 Ark. 245, fraud renders a sale voidable, not void, the seller having intended to pass the title.

12. In *I v. P*, 1 Me. 376, if the vendor would rescind a contract for the sale of goods, and reclaim them, on account of fraud in the vendee, it must appear that deceptive assertions and false representations were fraudulently made to induce him to part with the goods.

13. In *E v. R*, 54 Kans. 747, one who, with full knowledge of the facts, brings an action for the price of goods against one who purchased them from him by fraud, affirms the sale.

14. In *M v. W*, 20 N. Y. 533, when one agrees to sell a horse, which he does not own, and receives part of the purchase price, intending thereafter to acquire title, his subsequently acquired title and possession inures to the benefit of the one to whom he has sold and the contract then ceases to be executory.

15. In *P v. K*, 51 Minn. 193, where an order for goods separately specifies the quantity and price of each article, the contract is severable, so that the purchaser may, on receipt of the goods, retain those in accordance therewith, and refuse those which are not.

16. In *K v. B*, 12 N. Y. Sup. 670, on a sale of goods subject to a certain discount if paid before a certain time, the purchaser is entitled to the discount only on full payment of the price in cash before the expiration of the time specified.

17. In *DeG v. B*, 63 Mich. 25, one who has sold and delivered goods and accepted payment cannot rescind the contract and replevy the goods on the ground that the goods delivered included some which were not purchased. He has only the right to take out the excess in such manner as not to inconvenience the purchaser.

18. In *S v. E*, Bk 56 Mo. App. 662, to entitle the vendor to rescind a sale on the ground of false and fraudulent representations by the vendee concerning his financial condition, the vendor must show affirmatively that the sale was made partly on credit, at least, and must return any consideration received by him.

19. In *L v. R*, 23 Mo. App. 436, if a vendor would rescind for fraud, he must do so within a reasonable time.

20. In *M v. R*, 47 Ill. App. 372, where property sold is accepted by the buyer, in the absence of fraud he cannot return it and rescind the contract; but, if the property is not as represented, his remedy is an action for breach of warranty.

21. In *C v. B*, 73 Miss. 297, under an agreement whereby the vendor of certain staves was to deliver the same at a railroad depot, where they were to be inspected and culled by the vendee, there was no delivery under the contract until the staves were culled and accepted at the place designated.

22. In *G v. K*, 93 Ga. 510, a sale of cotton from A to B was agreed upon. It was weighed and was to be removed from A's warehouse and paid for on the next day. B indorsed "O. K." on the bill, and signed his name to it. The cotton was burned in A's warehouse that night. Held, that the loss was A's, not B's.

23. In *G v. N*, 25 Mo. 29, sale by sample of five hogsheads of sugar by plaintiffs to defendants. Defendants asked to have the sugar weighed, which was done, and weigher's certificate together with a bill for the price sent to defendant. Held, a sufficient delivery; so that when defendant sent for the sugar and found one hogshead missing, it was his loss.

24. In *H v. G*, 66 N. H. 621, a purchaser of lumber, to be of certain dimensions, has a right, on its being shipped to him in cars in which it cannot be inspected, to remove it, and inspect and measure it, before determining to accept or reject it.

25. In *O & Co. v. F*, 38 W. Va. 31, defendant bought a harvesting machine called a "binder," upon the condition that if it did not work to his satisfaction he might return it. Held, that his right to reject was absolute, and his reasons could not be investigated.

26. In *F v. S*, 31 N. C. 32, where A contracted to deliver to B 100 fish stands of a certain description, and, upon his tendering them, B received 50 but refused to receive the other 50 because they were not made according to the contract, it was held that the receipt of the 50 stands did not make B responsible for the other 50 which were not made according to contract.

27. In *P v. C*, 56 Mich. 552, goods left on trial, under an agreement that if they prove satisfactory they shall be paid for on a certain day, remain the vendor's and at his risk until such date, if not accepted before.

28. In *D v. F*, 16 Me. 17, where the owner of a chattel delivers it to another and takes his promise in writing to return it on a day specified or pay a sum of money therefor, the property in the chattel passes from the former to the latter at the time of the delivery.

29. In *S v. W*, 25 Ill. 514, the title to property does not pass under an agreement for its manufacture, until it is complete, ready for delivery, and notice is given, or some equivalent act is performed.

30. In *W v. R Co.*, 29 N. J. Eq. 311, a seller who has been induced by fraudulent means to sell and deliver goods has a right to rescind the sale and reclaim the property, even as against transferees, unless they are purchasers in good faith for value; and such right continues until, with knowledge of the facts, he has confirmed the sale.

31. In *L v. B*, 4 (Paige) N. Y. 537, where goods are obtained by false and fraudulent pretenses, the person from whom they were obtained may follow them into the hands of any person who has paid no new consideration for the transfer to him.

32. In *H v. E*, 1 S. W. 707, to constitute a valid sale of chattels, as against the vendor's creditors and subsequent purchasers, there must be an actual, substantial, visible change and delivery of possession.

33. In *K v. B*, 53 Miss. 596, possession of personal property is not title. It is *prima facie* evidence of title, but nothing more, and will not protect one who buys on the faith of it against the holder of the title.

34. In *B v. T*, 66 (Barb) N. Y. 169, an affirmative by the seller that the property proposed to be sold belongs to him, or is of a certain description or quality, is a warranty.

35. In *P v. M*, 34 Iowa 522, by the terms of a warranty under which a reaping machine was sold, it was stipulated that in case it failed to work as warranted it was to be returned by the purchaser to a certain place. Held, that a notification by the seller to the buyer that he would not receive the machine back excused the buyer from any effort to return it.

36. In *D Co. v. A B*, 123 Mass. 12, one sold goods to be paid for on delivery, either in cash or notes of the purchaser. They were shipped under a bill of lading by which they were to be delivered on the payment of the freight. Before they arrived, some of the purchaser's notes were protested, and an agent of the seller was sent to stop the goods in transit. They were attached by one of the purchaser's creditors before his arrival, and before the purchaser had paid the freight or come into possession of them. Held, that the right of stoppage in transit had been reasonably exercised.

258. HYPOTHETICAL PROBLEMS

1. A promises to give B a horse the next week and fails to do so. Can A enforce the promise?

2. A gives B a horse and the next week asks B to give it back to him. Must B comply with the request?

3. A rents a building from B for manufacturing purposes. When the lease expires B refuses to permit A to remove his machinery. To whom does the machinery belong?

4. A sells a house to B and nothing is said about a hot water heating plant installed in the usual way. Does the heating plant pass with the building?

5. A sells one hundred bushels of wheat to B for 80 cents a bushel, for which it is agreed he shall pay on the first day of the following month. The wheat is sacked up ready for B whenever he calls for it. B tenders payment according to agreement, but, wheat having risen to \$1.00 a bushel, A refuses to deliver. Can B enforce delivery?

6. A rents property to B, who builds a barn thereon, on a stone foundation. In the absence of agreement can B remove the barn on expiration of his lease?

7. If B had built his barn on blocks supported by planks laid on the ground would it have made any difference?

8. Do the gas and water pipes pass with a building?

9. A is B's tenant and installs a furnace, but does not fasten it to the walls or floors. May he remove it?

10. A and B own a boat together. A sells the boat to C, who has no notice of B's interest. Can B recover the property? If not, what remedy has he?

11. A lost a diamond ring which B found and sold to C. C being an innocent purchaser, can A recover the ring? May C recover its value from B?

12. A bought 50 bushels of wheat of B. It was agreed that the wheat should be measured out and paid for the next day. During the night it was destroyed by fire. Whose is the loss?

13. Jones bought wheat, by sample, from Williams at market price. Williams delivered wheat equally as good as the sample, both being worthless. If Jones has paid for the wheat can he recover his money? If Jones has not paid for the wheat, can Williams enforce payment?

14. A consigns goods to B. B fails before receiving them. A stops them in transit and they are attached by creditors of B. Who is entitled to the goods?

259. SEARCH QUESTIONS

What personal property is exempt from execution? When a defendant files a schedule of property as exempt from execution, what method of appraisement is provided for?

Are there any debts from which no property is exempt? What is the effect of a legal tender of personal property in payment of a debt?

Is there a section of the Statute of Frauds relating to the sale of goods? What is the amount?

What sales are considered fraudulent? What provisions are made for chattel mortgages; acknowledgment, record, sales, any requirements as to the form of the promissory note evidencing debt?

What are the rules of descent in case of death of a person dying intestate?

Does the law recognize the possession of birds and animals as that of personal property? Is the rolling stock of railroads classed as personal or real property? May it be seized on execution? How is the personal property to be valued for taxation? When is it listed for taxation? When to be paid? When sold for non-payment of taxes? Is there an inheritance tax? Are any of the taxes progressive? Any regressive?

CHAPTER XXXIV

BAILMENTS

- 260. INTRODUCTION
- 261. DEFINITION
 - 1. Parties
 - 2. Exceptions
 - 3. Classes
 - 4. Subdivisions
- 262. DEGREE OF CARE
- 263. ABSENCE OF CARE
- 264. SKILL
- 265. TERMINATION OF BAILMENT
- 266. RECAPITULATION
- 267. QUESTIONS

260. Introduction. The law of bailments has ever been important in the development of civilization. This subject deals with every class and branch of business. It has to do with the rights, duties, and liabilities of parties wherein one has the personal property of another in his care or keeping. This is so irrespective of whether the possession was voluntary or not, or whether he receives a consideration or not for his services. The main duty now incumbent on the person holding the property of another is to surrender the property to the rightful owner when some specific purpose has been accomplished. Any holding of the personal property of another that does not constitute a transfer of title is a bailment. Many common examples may be cited; as, A leaves his horse with B for safe keeping; this is a bailment, A is the bailor and B is the bailee. A loans his horse to B for the use of B; this is a bailment. A lets his horse to B for

hire; this is a bailment. A leaves a package on a train, B, the conductor, turns it over to the company; this is a bailment.

261. Definition. A bailment is a delivery of goods to another for a specific purpose other than a sale. After the purpose has been accomplished, the goods in the same or a changed condition are to be returned to the original party. The purpose may be for safe keeping, for use, for security, or to have work done upon the goods.

Other Definitions. "A delivery of goods in trust on a contract, express or implied, that the trust shall be duly executed and the goods re-delivered as soon as the time or use for which they are bailed shall have elapsed or be performed."

"A delivery of goods to another person for a particular use."

"A bailment is a transfer of the possession of personal property, without transfer of ownership, for the accomplishment of a certain purpose, whereupon the property is to be re-delivered, or delivered over to a third person." X

1. *Parties.* The direct parties to a bailment are two in number: the bailor, the one who delivers the goods and who holds the title; the bailee, the one to whom the goods are delivered and who therefore has the possession. The bailment may be for the benefit of a third person. The general rule of contracts applies as to competency. Only personal property may be the subject of a bailment. The title is in the bailor and the possession in the bailee. A bailment terminates upon the return of the goods in the same or a changed condition to the bailor. If the goods returned are not the same as those delivered, the contract is not one of bailment. If a farmer delivers wheat to a miller and receives from a general supply a proportionate amount of flour there is no bailment, it is a barter. If the flour, delivered by the miller to the farmer, is to be manufactured from the latter's wheat, it is a bailment. Upon determining whether the contract is a bailment or not depends where the loss will fall in case the goods are destroyed. In the above illustration it would fall in the first instance on the

millar, in the second on the farmer. The distinction is sometimes difficult. The test is, is the identical property to be returned. If so, it is a bailment; otherwise, a sale or barter.

2. *Exceptions.* There are several apparent exceptions to the above which will be discussed from time to time as occasion demands.

3. *Classes.* Bailments may first be classed as gratuitous and non-gratuitous. The first are those that are performed free of charge; the second, those that are performed for a charge.

4. *Subdivisions.* Gratuitous bailments are subdivided into three classes: deposit, commission, and loan for use.

Non-Gratuitous are subdivided into two classes: pledge and hire.

Gratuitous bailments are either for the sole benefit of the bailor, or for the sole benefit of the bailee. Where A leaves a horse with B for safekeeping, the benefit is entirely A's; and where A loans a horse to B for his use, the benefit is entirely B's.

Non-gratuitous bailments are for the benefit of both parties. Where A loans a horse to B for hire, each one is benefited; and where A leaves his watch with B for the loan of \$20.00, both parties are benefited.

262. *Degree of Care.* The degree of care that the bailee must take of the goods that are in his possession depends upon who enjoys the benefit. The determining element is, Who is to receive the benefit? Evidently more care should be expected of a bailee who borrows a horse for use than of one who takes care of the bailor's horse without charge. In determining the degree of care to be taken it will be convenient to classify care as *slight*, *ordinary*, and *great*. Slight care is that degree of care that a man, however careless, takes of his own goods. Great care is that degree of care that a man of great care and diligence takes of his own goods. Ordinary care is that degree of care that a man of ordinary care and diligence takes of his own goods.

<i>Kind of Purpose.</i>	<i>Specific Purpose.</i>	<i>For Whose Benefit.</i>	<i>Care Required of Bailee.</i>	<i>Claim for Damages When Bailee Fails to Take—</i>
Deposit	Safe keeping	Bailor	Slight	Slight care
Commission	Work	Bailor	Slight	Slight care
Loan for use	Use	Bailee	Great	Great care
Pledge	Security	Both	Ordinary	Ordinary care
Hire	Use, security	Both	Ordinary	Ordinary care

If the bailor gets all the benefit of the bailment, the bailee is required to exercise but slight care. If the benefit is for the bailee, he must exercise great care; and if each party is benefited, the bailee must take ordinary care.

The difference between slight and great care is not necessarily very marked, and again, owing to circumstances and surroundings, there may be a great difference in the exercise of the same degree of care in a bailment. For example, A leaves with B a horse for safekeeping; B must take slight care. Again, A loans a horse to B for his use; B must exercise great care of the horse. The actual care is practically the same. In each case the horse should be properly housed and cared for. Again, the thing bailed is money; in one locality the bailee might be required to put it under lock and key, while in a different locality it might be left in an unlocked room.

263. Absence of Care. The absence of that degree of care required by law, resulting in damage to the thing bailed, makes the bailee liable in damages to the bailor irrespective of the degree of care that the bailee is to take. Want of the care required by law is a dereliction of duty, called negligence, and makes the party chargeable responsible in damages.

In determining what care should be used and what is the proper exercise of that degree of care, one must take into consideration the customs of the place, the value of the article, the condition of the climate and conditions of the times. All of these must be carefully considered in determining the question and degree of care.

264. Skill. The chief object of the bailment is the benefit to be derived from the bailment. The bailee is thereby charge-

able with that degree of skill commensurate with the value and nature of the property. A great deal depends upon the knowledge which the bailor knows the bailee to possess.

265. Termination of Bailment. The bailment may be terminated in several ways. Many of these need no discussion. The parties to the bailment may mutually agree to terminate it. Where the bailor receives all the benefit, he may demand the return of the goods at any time provided the bailee has no incidental charges. Where the bailment is for the benefit of the bailee, the bailor may demand the return of the goods at the expiration of the time. The bailment terminates on the destruction of the property. The right of the bailee to hold the goods will be discussed under the subject of lien.

266. RECAPITULATION

A bailment is a delivery of goods to another for a specific purpose. Only personal property may be the subject matter of a bailment.

Bailments are classed as gratuitous and non-gratuitous.

Care is classed as slight, ordinary, and great.

The degree of care for which the bailee is responsible is in direct ratio to the benefit received by him.

Negligence is "a breach of duty to exercise commensurate care, resulting in damages."

The amount of skill for which the bailee is chargeable depends somewhat upon the character of the bailment and the knowledge of the skill that the bailor knows the bailee to possess.

When the specific object has been performed the goods must be returned.

267. QUESTIONS

What class of relations is embraced in bailments? Define bailment; bailor; bailee. What property may be the subject of a bailment? When is it terminated?

Name the classes of bailments and the subdivisions of each class. Define and illustrate gratuitous and non-gratuitous bailments. State the different degrees of care required of the various classes of bailees. Mention some things that affect the degree of care. Is it the absence of care, or injury to the thing bailed, that enables the bailor to hold the bailee? Explain the difference. Mention some things that may terminate a bailment.

CHAPTER XXXV

BAILMENTS FOR BENEFIT OF BAILEE OR BAILOR

268. WHERE BAILEE RECEIVES WHOLE BENEFIT—

Loan for Use

1. Care
2. Expenses
3. Return of Property
4. Duty of Bailor

269. WHERE BAILOR RECEIVES WHOLE BENEFIT

1. Deposit
2. Use of Deposit
3. Commission
4. Care
5. Re-delivery

270. RECAPITULATION

271. QUESTIONS

268. Where Bailee Receives Whole Benefit. *Loan for Use.*

In this bailment the bailee receives the sole benefit. It is simply the loaning of a thing to another for him to use personally. If the bailor receives any benefit, the nature of the bailment is changed at once.

1. *Care.* Since the bailee receives all of the benefit, he is held strictly accountable for the thing loaned. He must exercise a high degree of care. So strictly is the bailee held accountable, that any change in the use of the thing loaned, any deviation of the agreement substituting a third person, makes him liable for all losses irrespective of the degree of care used.

2. *Expenses.* The bailee, impliedly at least, undertakes to pay for all such incidental expenses as proper care and use demand. If he has the loan of a horse, the horse must be properly

fed, housed, and groomed. This is necessary in order that he may enjoy the benefit of the loan; if, however, it becomes necessary to meet any unforeseen expenses as the employment of a veterinary, the bailor must reimburse him. The first expense named may be considered necessary, understood, or customary, and the second extraordinary, not necessarily contemplated at the time of the borrowing.

3. *Return of Property.* It is the duty of the bailee to return the property at the agreed time, also any natural increase in the same. If the thing loaned is a bond or other security for the use of the bailee, he must return any interest accumulated or collected by him. If the bailee has paid any extraordinary expenses, he has a right to be reimbursed prior to delivery. The bailee has no right to hold the property for any claim in the nature of an old debt against the bailor.

4. *Duty of Bailor.* The chief obligation on the part of the bailor is to allow the bailee free and unrestricted use of the thing bailed.

269. Where Bailor Receives Whole Benefit. In this chapter we consider a class of agreements or relations where a certain amount of accommodation is to be considered. It represents no business calling.

1. *Deposit.* This is the simplest as well as the oldest kind of bailment. It is the depositing of goods with another for safe-keeping without charge. The bailee obligates himself to return the property to the owner whenever demand is made. The bailee must also return all increase or accumulation that may take place. Since the benefit is entirely for the bailor, only slight care is exacted of the bailee. If he receives special instructions in regard to the bailment he must not disregard them. The bailee may return the property to the bailor at any time. If the bailee has incurred any expenses incident to the keeping, he has a right to hold the goods until repaid. The bailee is not obligated to undertake such a bailment; but if he does so he assumes the liability incident to it. If the bailee does not take the proper degree of

care and the property is damaged thereby, he becomes liable in damages.

2. *Use of Deposit.* As a rule the bailee must not use the deposit. If, however, use of the chattel is necessary or beneficial, he may use it; in fact, if necessary, he must do so, e. g., to exercise a horse or milk a cow. If the use is not beneficial or necessary, he has no right to use the property.

3. *Commission.* This is a bailment of goods for the purpose of enabling the bailee to perform some work or benefit on the goods free of charge.

4. *Care.* The bailment being solely for the benefit of the bailor, only slight care is exacted of the bailee, and an injury to the property resulting from the want of slight care makes the bailee liable in damages.

The bailee is not obliged to commence or undertake such a bailment; but, having voluntarily commenced, he is accountable for a degree of skill commensurate with the value and intricacy of the labor to be performed. A offers to carry a cask of wine for B from one place to another. This is purely a gratuitous offer and there is no obligation on the part of A to do the work. If, however, he calls for and receives the cask and starts on its carriage, he is liable for any loss occasioned from improper care and lack of skill.

5. *Re-Delivery.* When the bailment is terminated, the bailee must return the property to the bailor. If, however, the bailor is not the lawful owner, the bailee may be directed to return the property to the one having the title. The bailee has a right to hold the property until he is reimbursed for any accidental or necessary expense coupled with the bailment. The bailee, however, had no right to retain the property in satisfaction of some other claim that he may have against the bailor.

270. RECAPITULATION

The bailee receives the sole benefit in the *loan for use*. The bailment is for his personal use. A high degree of care is required of him. Any deviation from the original purpose makes him liable for all losses.

The property must be returned at the agreed time. The bailee must bear incidental expenses, but is entitled to be reimbursed by the bailor for extraordinary expenses.

In the deposit, the bailee receives the goods for safe keeping without charge, to be returned upon demand. In this, the bailor receives the whole benefit of the bailment, and only slight care is required of the bailee. Special instructions must not be disregarded, but the property may be returned at any time.

The bailee has a right to be reimbursed for expense incurred. If he fails in proper care he is liable in damages; unless use is beneficial or is necessary he must not use the article deposited.

A commission implies that the bailee will work or perform some benefit on the goods bailed, free of charge. This bailment is for the sole benefit of the bailor, and only slight care is required of the bailee. The bailee may refuse the commission, but, having accepted it, he must exercise the degree of care and skill requisite to the undertaking. He may return the property to the person having title, but has the right to hold the same until reimbursed for necessary expense, but not for some other claim against the bailor.

271. QUESTIONS

Describe the loan for use, the degree of care required of the bailee, and the duty of the bailor.

Define a deposit, and state the rights and duties of the bailor and bailee.

Define a commission. State the rights and duties of the parties in a commission as regards care, re-delivery, etc.

CHAPTER XXXVI

BAILMENT FOR BENEFIT OF BOTH PARTIES

272. INTRODUCTION

273. PLEDGE OR PAWN

1. Debt
2. Possession
3. Duties and Rights of Pledgee
4. Rights of Pledgor
5. Remedies

274. PAWNBROKERS

275. RECAPITULATION

276. QUESTIONS

272. Introduction. By far the greater number of bailments are of this class wherein both parties are benefited. The former classes do not represent business enterprises. Here is found the true consideration to support the bailment as it is ordinarily understood. The idea of mutuality of benefit is present and this fixes the liability of the parties. This is the most important class of bailments, and includes all business relationship whereby the contract of bailment is entered into and for which an implied or expressed remuneration is given by the bailor to the bailee as a consideration for his services. There are two classes of bailments in which mutuality of benefit is present. The bailment of pledging and the one of hiring.

273. Pledge or Pawn. This bailment is a delivery of personal property as security for the payment of a debt. It is one of the oldest kinds of bailment. The simplest illustration is where money is loaned and some chattel is given as a security that the debt will be paid at a certain time. A very similar transaction,

and one of frequent occurrence is known as the giving of collateral security. In this the thing bailed is the delivery of stocks or bonds as a security for a loan. To illustrate: A goes to his banker and borrows \$1000.00, delivering to the banker, bonds, the market value of which is greater than the loan. A usually gives the banker authority to sell the bonds if the debt is not paid at maturity. Out of the sale, will be deducted the debt and any additional charges.

1. *Debt.* From the definition and nature of the bailment it is evident that there must be a debt. The bailee may hold the pledged property until the debt and all proper charges are paid. The debt may be absolute or conditional; absolute, as in the loaning of the money; conditional, as in the obligation assumed by an indorser or surety on the part of the bailor.

2. *Possession.* The pledgee must have actual or constructive possession of the property, but he may make the pledgor his agent and allow him to continue in the use of the property. If the pledgee surrenders his possession to the pledgor, the bailment is at an end. The debt is not, however, thereby cancelled.

3. *Duties and Rights of Pledgee.* The parties are mutually benefited by the bailment—the pledgor, by being able to contract a debt the security for which is the thing bailed; the pledgee, by being secured for the amount loaned. The bailee is therefore accountable for ordinary care only. When the bailment is terminated by the payment of the debt the bailee must not only return the property bailed, but any increase by way of interest, dividends or offspring of animals. The pledgee is liable for loss occasioned by absence of proper care. The pledgor, however, must show that such loss was caused by the negligence of the pledgee. If the goods are stolen, this fact does not necessarily make the pledgee liable. The burden of proving lack of care is on the pledgor. The main right of the bailee is the right to hold the property for the payment of the debt, a right of detainer, as it is called. The debt, however, must be a legal one. If it is tainted with illegality, or if the bailment is forbidden by the law, the bailment is voidable, if not void.

4. *Rights of Pledgor.* The bailor having parted with possession of the property still holds the title, which, however, is subject to the bailee's claim. His first right is to redeem by paying the debt and thereby terminating the bailment. He may sell, transfer or mortgage his title in the property, but always subject to the rights of the bailee. The purchaser acquires all the bailor's rights and may pay the debt and demand the return of the property.

5. *Remedies.* The pledgee upon default of the pledgor has a choice of several remedies: (1) He may sue the pledgor for the debt; (2) he may sell the property after proper notice has been given; (3) he may ask for a decree of foreclosure. The sale must generally be public, and free from fraud. The pledgee cannot appropriate the property in satisfaction of the claim. If in the sale there is a deficit, he may sue for the balance; and if there is a surplus, it must be accounted for to the pledgor.

274. *Pawnbrokers.* The pawnbroker's business is regulated largely by state legislation. At common law the rights of a pawnbroker are the rights of an ordinary pledgee. The business is that of furnishing loans on personal property delivered to the pawnbroker. The pawnbroker was the forerunner of the present banker. He loaned money at interest, receiving as a security personal property. The distinction so far as loaning money is concerned is that the banker demands security in the form of notes, stocks, bonds or real estate, whereas the pawnbroker's security is generally personal chattels.

275. RECAPITULATION

Mutuality of benefit is the main feature of bailments that embody business enterprises.

A pledge or pawn is the bailing of personal property as security for debt. The debt may be absolute or conditional, but must exist in the case of a pledge.

The pledgee must have possession, actual or constructive, of the property. The pledgee may surrender his interest in the property to the pledgor but this does not cancel the debt.

The pledgee is responsible for ordinary care.

Upon payment of the debt the property must be returned with all interest or increase.

The bailor may make any disposition or transfer of the property not inconsistent with, but subject to, the rights of the bailee, and is entitled to the return of the property upon payment of the debt. The pledgee may sue for the debt, or by statute sell the property after notice, or sue for foreclosure of his lien. He can not take the property in satisfaction of the debt. If after sale there is a deficiency, he may recover the same from the pledgor; but the surplus, if any, must be turned over to the pledgor.

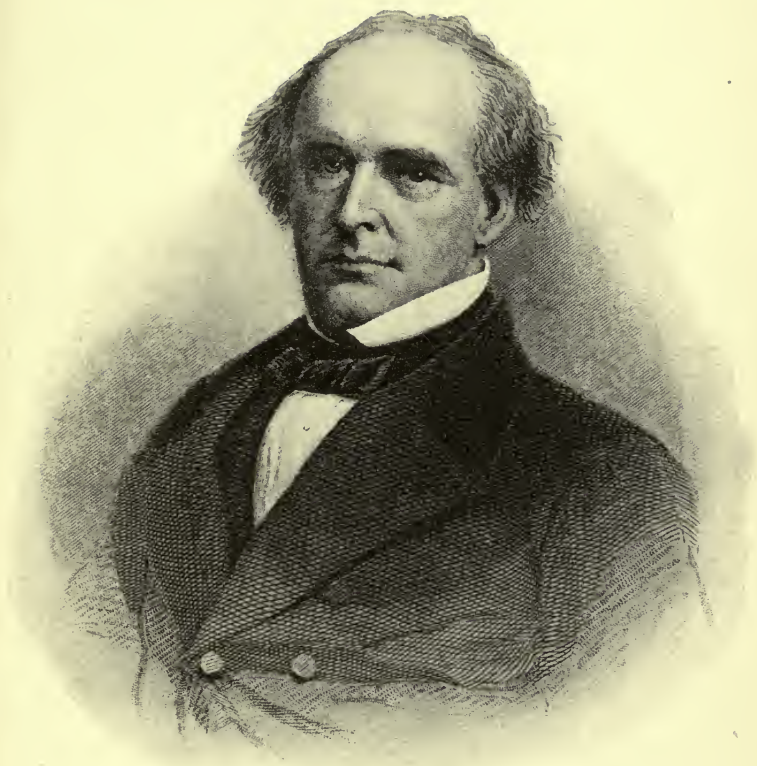
The pawnbroker was the forerunner of the banker. The former takes chattels as security; the latter takes notes, stocks, bonds, and the like.

276. QUESTIONS

What is the largest and most important class of bailments? Define a pledge or pawn. Illustrate collateral security.

Who has possession in the case of a pledge? What are the rights and duties of the pledgee? What are the rights of the pledgor? What are the remedies of the pledgee?

Describe the business of the pawnbroker. How does it differ from that of the banker?



SALMON P. CHASE

SALMON P. CHASE (1808-1873)

Educated at Dartmouth College, admitted to the bar in 1830, prominent in anti-slavery conventions, elected Governor of Ohio in 1855, nominated for President, appointed Secretary of the Treasury in 1861. Under his management the *National Banking Act* was passed which is still in force in 1913. In 1864 he was appointed Chief Justice of the Supreme Court. He presided at the trial of Andrew Johnson, President of the United States. His term as Chief Justice covers the Reconstruction period of American history. Many questions of great importance were settled during this time.

CHAPTER XXXVII

BAILMENT OF HIRE

- 277. CLASSES
- 278. HIRING OF USE
 - 1. Duty of Hirer
 - 2. Duty of Letter
- 279. HIRING OF CARE AND CUSTODY
 - 1. Care
 - 2. Warehouseman—Exception
 - 3. Wharfingers
 - 4. Safe Deposit Companies
 - 5. Agisters
- 280. OTHER BAILMENTS
- 281. HIRING OF LABOR
 - 1. Care and Skill
- 282. SPECIAL PROPERTY
- 283. COMPENSATION
- 284. MATERIALS USED
- 285. LIEN
 - 1. Special Lien
 - 2. General Lien
- 286. ENFORCING RIGHTS
- 287. RECAPITULATION
- 288. QUESTIONS

277. Classes. Bailments of this class are divided as follows: Hiring of use; hiring of care and custody; hiring of labor; and hiring of carriage.

278. Hiring of Use. In this bailment the hirer secures the use of personal property of another for a definite time, and for

which he pays a consideration. The business of the liveryman is the best illustration.

1. *Duty of Hirer.* It is the duty of the hirer or bailee to confine the use of the thing to the terms of the contract, yet a slight deviation would not make him liable for damages where he was not negligent. If a saddle horse was hired, the hirer would not be allowed to use the animal for draying purposes. Incidental expenses must be borne by the hirer, extraordinary expenses by the letter, or bailor. The hirer is bound to use ordinary care.

2. *Duty of Letter.* It is the duty of the letter to deliver the property at the agreed time, and in no way is he to interfere with its use by the hirer. The letter must keep the thing in condition for use, and must not so dispose of his interest so as to affect the rights of the hirer.

279. Hiring of Care and Custody. This is one of the bailments of hire in which proper care and custody is offered on one side for a consideration. To properly conceive of the magnitude of such bailments one has but to recall the immense business of the warehouses in all cities for the storage of goods, and trust companies that offer safe deposit places for valuables.

1. *Care.* The chief thing in this bailment is the use or security of the thing bailed, and since a consideration is given for this, only ordinary care is required. The relationship, except in so far as the degree of care is involved, is practically the same as in deposit. In this chapter will be discussed some business occupations confined to this class of bailment.

2. *Warehouseman.* A warehouseman is one engaged in the business of providing safe storage for property. He has been defined to be "A person who receives goods and merchandise to be stored in his warehouse for hire." The business includes the storing of grain (where the same grain is to be returned to the bailor), household goods, and commodities generally. There is no obligation on the part of the warehouseman to accept such goods. But in some states public warehouses have been licensed,

and, as a consequence, they are obligated to accept all proper goods for safekeeping.

Exception. On analyzing the duties and obligations of a warehouseman who stores grain, it will be found that a true bailment does not exist. One of the main tests is that the identical goods shall be returned to the bailor. The storer of grain mixes all the grain of the same quality or grade together and is under obligations to give back an equal amount out of the common mass, as it would not be practicable to keep the grain in separate bins. The warehouseman does not intend to accept the title; he intends only to accept the possession and to consider the transaction merely in the light of a temporary safe keeping of the grain. Therefore, taking the intent of parties into consideration, the courts have wisely concluded to interpret the relationship to be that of bailment and not of sale. Likewise, if a farmer delivers grain to a miller and later is to receive a proportionate quantity of flour, the relationship during this period is that of bailment.

4. *Wharfingers.* A wharfinger is a person who keeps a wharf for the purpose of receiving and shipping merchandise. His duties and liabilities are similar to those of the warehouseman. His responsibility begins when the goods are delivered to him on the wharf and he has expressly or impliedly received them. It ends when he has delivered them under similar conditions.

5. *Safe Deposit Companies.* Safe deposit companies are organized for the purpose of offering safe-keeping places for valuables; that is, they offer for rent a vault or box, agreeing to keep a good and adequate guard over it. They do not have the actual, but merely constructive, possession of the articles. It is generally held that the liability of a safe deposit company is similar to that of a warehouseman.

6. *Agisters.* An agister is one who takes care of cattle for compensation. The degree of care required of him does not materially differ from that of other bailees for hire. He must exercise ordinary care, and is liable for all losses occasioned by the absence of that care. His grounds must be properly enclosed, and it is negligence for the agister or his servants to fail to properly close gates.

280. *Other Bailments.* An agent may be a bailee for hire, and must take ordinary care; he is not liable for loss by fire,

theft, or accident, unless coupled with his own negligence. Commission merchants are held as bailees while goods are in their possession. They have a right to sell the goods but not to pledge them. They must act with reasonable diligence and in good faith, and must follow all reasonable instructions.

281. Hiring of Labor. The primary duty of the bailee in this bailment is to perform the services agreed upon in good faith. This bailment is closely allied to that of commission, except that in the one a consideration is given for the service rendered. To this class belong jewelers, tailors, and, in fact, anyone to whom goods may be delivered for some specific work to be performed upon them and then returned.

1. *Care and Skill.* The bailee must use ordinary care in the safe keeping of the property, and must exercise reasonable skill in the performance of his duty.

282. Special Property. In all bailments for hire, the bailee has a special property in the thing bailed, to the extent of excluding the bailor while the bailment is being performed. This is so in order that he may earn the agreed consideration. As a further protection, he is given a lien or right to maintain this possession until his charges have been paid. The special property interest is of such value that in order to fully protect himself the bailee may have the property insured. Under the policy so secured he may collect the full value of the property insured. If the amount so recovered is more than the value of his interest, he holds the excess in trust for the bailor.

283. Compensation. The bailee is entitled to compensation for work performed, even though the thing bailed is subsequently destroyed through no fault of the bailee. The compensation is subject to the contract of the parties. If the services have been but partly performed at the time of the destruction of the thing bailed, the bailee is entitled to a proportionate part of the contract price for work performed and for any material used in the work. If the agreement is for the whole job when completed, and a loss occurs, the bailor must lose the thing

bailed and the bailee his work and material. If the work has been done in an unskillful manner so as to destroy the value of the thing bailed, the bailee is entitled to no consideration, and may be held liable for the loss.

✓ **284. Materials Used.** The materials used by the bailee become part and parcel of the article bailed, even though the value of the added part greatly exceeds that of the original. This is an important distinction, as in case the goods are lost through no negligence on the part of the bailee he is entitled to compensation for the material used as well as work performed. The transaction is a bailment and not a sale.

285. Lien. In general, every bailee for hire has a right to hold the possession of the bailed goods until his charges have been paid. This is known as the right of lien, and to exercise this lien possession must be maintained. Liens may be classified as special and general.

1. *Special Lien.* A bailee is exercising a special lien when he holds goods for charges incurred on those particular goods. The lien attaches to each and every part of the goods in question. It is no release of the lien or the residue to deliver a part of the goods. Of course the lien on the part delivered would be at an end, but the lien would still exist on the rest of the goods for the whole claim.

2. *General Lien.* A general lien differs essentially from a special lien in this: that "the latter is a right which grows out of expense or service bestowed on the particular property of another, while the former attaches an account of a general balance due from the owner." The law does not favor extending the rights incident to a general lien. For example: A repairs at different times three watches for B, having three distinct charges for the work performed. Under a general lien he could hold the last watch for the three charges. The law, however, allows him but a special lien, the right to hold the last watch for the charges on that particular watch. The right to a general lien is said to exist in favor of commission merchants, attorneys and bailees,

generally where it is impracticable to keep the charges separate and distinct. The general lien extends to a general balance incident to a series of transactions of a similar nature.

286. Enforcing Rights. The common law of lien recognized no further right than the right of possession. The right to sell or otherwise dispose of the goods is conferred by statutory enactment.

287. RECAPITULATION

Bailments of hire include hiring of use, hiring of care and custody, hiring of labor, and hiring of carriage.

In hiring of use the bailee secures the use of property for a definite time for which he pays hire. The terms of the contract of hiring must be followed closely; any slight deviation may render the bailee liable for damages even though he is not negligent; in other words, he may become an insurer. Ordinary care must be exercised. Incidental expenses must be borne by the bailee; extraordinary expenses by the bailor. The bailor or letter must deliver the property at the agreed time and in proper condition, and must not interfere with use by the hirer.

In hiring of care and custody the chief thing is the safe keeping of the property bailed. A warehouseman is one who provides safe storage for property. Where grain is stored, like quantity and quality, though not necessarily the identical property, must be restored. Ordinary care is required.

A wharfinger is one who keeps a wharf for the purpose of receiving and shipping goods. He is bound by the same degree of care as a warehouseman.

Safe deposit companies furnish vaults or boxes for the safe keeping of valuables.

An agister is one who takes care of cattle for compensation.

Commission merchants are bailees while goods are in their possession. They may sell but not pledge the property. They must exercise reasonable diligence and good faith.

The bailee has a special property interest in the thing bailed and may protect his interest by insurance. He may also, after the purpose of the bailment has been performed, retain possession until his charges are paid. The bailee's compensation is governed by the terms and conditions of the contract, express or implied.

A special lien consists of the right to hold goods for charges incurred in respect to those goods, and attaches to the entire lot.

288. QUESTIONS

How are bailments for hire classified? Define and illustrate hiring of use? What are the duties of the hirer? Of the letter? Give illustrations of the hiring of care and custody. Define the degree of care required.

Define warehouseman. What are his duties as regards the acceptance and care of commodities? In whom is the title?

Define a wharfinger and his duties. Discuss safe deposit companies. Define an agister and his duties. What are the duties of agents and commission merchants? Discuss the duties, care, and skill in a hiring of labor.

What are the special property rights of the bailee in bailments of hire? Discuss his right to compensation for labor performed and materials used.

What is the bailee's right of lien? What is a special lien? To what does it attach? How is it affected by a delivery of a part of the goods?

How does a general lien differ from a special lien? In whose favor does a general lien arise?

CHAPTER XXXVIII

INNKEEPERS

289. INTRODUCTION

1. An Inn
2. Innkeeper Defined
3. Limitations of the Term Innkeeper
4. Guests Defined

290. RIGHTS AND LIABILITIES OF INNKEEPERS

1. Duty
2. Liability
3. Property Liability
4. Exceptions to Liability
5. Lien
6. Termination of Relationship

291. RECAPITULATION

292. QUESTIONS

289. Introduction. In the previous chapters it is set forth that the liability of parties known as bailor and bailee depends upon the benefit derived by the bailee. Three kinds of care were recognized. In the following chapters the liability is classed as extraordinary; that is, few expenses will be accepted in case of loss of the bailor's property while it is in the possession or control of the bailee. Hence it is of great importance to know whether all the elements of these special bailments are present; if an element is lacking, the degree of care changes from extraordinary to ordinary care.

1. *An Inn.* An inn is a public place for the entertainment of man and beast. It has been defined to be "a public house for entertainment for all who choose to visit it." Doubtless what constitutes an inn might not now answer the requirements of a century ago.

2. *Innkeeper Defined.* An innkeeper is "one who holds himself out to the public as engaged in the business of keeping a house for the lodging and entertainment of travelers, their horses, and attendants, for a reasonable compensation." In order to establish the responsibility of innkeeper, several conditions must be present: (1) he must make a business of receiving guests; (2) it must be for a regularly established compensation, and (3) the offer of accommodations must be to the general public.

3. *Limitations of the Term Innkeeper.* It will readily be seen that all who offer entertainment to travelers are not innkeepers. A house that is divided up into apartments, or suites in which heat, light, and janitor service are included, and then rented to families, is not an inn. One keeping a boarding house is not liable as an innkeeper, chiefly because the right to select guests is maintained. Such places are not open to travelers indiscriminately. One who furnishes occasional entertainment is not an innkeeper. Steamship and sleeping car companies are held not to be innkeepers.

4. *Guests Defined.* A guest is one who offers himself to an innkeeper for accommodation and is accepted as such. Not all who accept and receive accommodations at an inn are guests. A guest is a transient. One who makes a special contract for entertainment is not a guest, nor is one who is invited to dine by an innkeeper. Yet some may accept special rates and still retain the standing of a guest. In the same establishment some of those accommodated may be classed as guests and some as boarders. The relationship of innkeeper and guest commences as soon as an agreement is entered into between the parties. The acceptance of a guest may be implied as well as from express agreement.

290. **Rights and Liabilities of Innkeepers.** 1. *Duty.* Since an inn is a house for the entertainment of the public, the innkeeper is as a rule in duty bound to accept all guests who offer themselves for entertainment. However, the innkeeper may refuse entertainment to one who is disorderly or suffering from

disease, or one who is not able to pay in advance for the entertainment.

2. *Liability.* The innkeeper's liability is that of an insurer of goods. This liability is modified in some states by statutory enactments. "When property committed to the custody of an innkeeper by his guest is lost, the presumption is that the innkeeper is liable for it, and he can relieve himself from that liability only by showing that he has used extreme diligence. What facts will excuse him is a question, perhaps, not very well settled, but it is well settled that he cannot excuse himself without showing that he had used extreme care and diligence in relation to the property lost."

3. *Property Liability.* An innkeeper is liable as an insurer only for such goods and effects of a guest as are reasonably necessary for the latter's comfort and enjoyment during his journey; and for other goods left in his keeping he is held merely as an ordinary bailee.

4. *Exceptions to Liability.* The severity of the liability assumed by innkeepers has induced them to enter into special contracts with guests somewhat limiting their liability, and particularly relating to property not placed under their control. But publishing a notice at the head of the register or posting a sign in the room does not release from liability. The notice must be brought to the attention of the guest and his assent be obtained. Some states have, however, enacted statutes to the effect that liability may be lessened by the publishing and posting of notices in various parts of the inn.

5. *Lien.* In order to properly secure the innkeeper for his charges, he is given the right of lien. He may retain possession of a guest's baggage until payment is made. Under the common law this was simply the right to hold; statutory law, however, gives him the right to sell, deduct charges, and turn the balance over, if any, to the delinquent guest.

6. *Termination of Relationship.* Ordinarily, the relation ceases when the guest departs. However, it may continue in relation to a guest's goods for a reasonable time after the guest

leaves. After the expiration of a reasonable time, the innkeeper is held only as an ordinary bailee. Such goods may be sold subsequently for storage charges.

291. RECAPITULATION

The liability of innkeepers and common carriers is classed as extraordinary.

An inn is a public place for the entertainment of man and beast.

An innkeeper is one who holds himself out to the public as furnishing lodging and entertainment for guest, servant, and horses. To be an innkeeper he must make a business of it, for regular compensation, and offer his accommodation to the general public alike.

One who rents out apartments or flats, furnishing certain service with them, is not an innkeeper. A boarding-house keeper is not an innkeeper, since he may select his guests.

Steamship and sleeping car companies are not innkeepers.

A guest is one who presents himself to an inn keeper for accommodations and is accepted. A guest is a transient.

The same establishment may contain both guests and boarders, owing to different conditions as applied to different individuals.

The innkeeper must accept all who present themselves in proper condition and who are able to pay, except as before stated. He is liable as an insurer of the goods of his guest which are necessary for the latter's comfort and enjoyment during his journey, but as to other goods he is an ordinary bailee.

The landlord may restrict his liability in regard to those goods not for the immediate use of the guest by directing that the guest put them in his safekeeping. The landlord retains possession of baggage until payment is made.

Under ordinary circumstances liability terminates when the guest departs.

292. QUESTIONS

Define innkeeper. What is an inn? Distinguish between a boarding-house keeper and an innkeeper. Distinguish between a guest and a boarder.

What is the duty of an innkeeper? His liability? What is his liability as to the property of a guest? How may the innkeeper limit his liability? Explain the innkeeper's right of lien.

CHAPTER XXXIX

COMMON CARRIERS

- 293. NATURE OF BUSINESS
- 294. DEFINITION
- 295. PRIVATE CARRIER
- 296. COMMON CARRIERS
 - 1. Rights and Liabilities
 - 2. Compensation
 - 3. Liabilities
 - 4. Special Contracts
- 297. BILL OF LADING
- 298. C. O. D. SHIPMENTS
- 299. TERMINATION OF RISK
- 300. CARRIERS OF PASSENGERS
- 301. THE INTERSTATE COMMERCE COMMISSION
- 302. RECAPITULATION
- 303. QUESTIONS
- 304. DECISIONS BY THE COURTS
- 305. HYPOTHETICAL PROBLEMS
- 306. SEARCH QUESTIONS

293. Nature of Business. Common carriers are engaged in the transportation for hire of goods for the general public from one place to another. The great railroad systems of the country present a splendid illustration of common carriers. The business is of a public nature and as such is governed by general laws. The Interstate Commerce Commission exercises supervision over freight rates between different states, and the general law of bailments is applicable to the relationship of parties, and,

in addition, the carrier is, except as noted, liable as an insurer of the goods.

294. Definition. A common carrier is one who makes a business of carrying for the general public goods from one place to another for compensation. Or he is "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place."

295. Private Carrier. By referring to the definition of common carrier three determining elements will be found, and if one of these requirements is absent, the person is a private carrier. A private carrier is generally one who carries for a limited number of persons, not for the general public for hire. A learned jurist says, "The distinction between a common carrier and a private or special carrier is that the former holds himself out in common, that is, to all persons who choose to employ him as ready to carry for hire, while the latter agrees, in some special case, with some private individual, to carry for hire."

296. Common Carriers. All business enterprises that include the three necessary elements just named are common carriers. Illustrations are, railroads, steam boat lines, express companies, truckmen, cartmen, and ferry boats.

1. *Rights and Liabilities.* A common carrier is a carrier for the general public. He is legally obligated to do this, and on a basis of reasonable equality. However, a common carrier may limit the line of goods that he carries, as a carrier of cattle or of grain, and he may refuse to carry all other goods. He may select his mode of carriage and refuse to change. He is not obliged to accept goods after his conveyances are full. A few states, however, have laws compelling common carriers to provide reasonable facilities. A common carrier is not obliged to receive dangerous or suspicious goods, and he has a right to know what he is carrying. He is obliged to give reasonable heed to general instructions such as, "Handle with care, glass," or "This side up," etc. He need not receive goods unless the shipper is the owner or has authority to ship.

2. *Compensation.* The carrier works for hire, and three ways are given him to enforce his rights: First, to demand the payment of the charges in advance; second, to receive the goods and deliver them at point of destination and then enforce his contract; or, third, he may exercise the right of lien which, in its nature, is a possessory right. His lien also covers charges advanced to other carriers. The right to hold includes the right to sell for charges after a reasonable time. The charges must be reasonable; the carrier is not obliged to accept ruinously low rates, nor is he allowed to exact exorbitant rates. The rate may be fixed by statutory enactment, but must be reasonable. The compensation is "on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant." The contract to carry is made with the consignor, but, *prima facie*, the consignee is the owner. If the goods are accepted, the law presumes ownership, and therefore the liability to pay the charge. The bill of lading, which is a shipping contract, usually states that the goods are to be delivered to a certain party who is to pay charges. Both the consignor and the consignee may be liable, but there can be only one satisfaction of the claim.

3. *Liabilities.* In order to show the liability of the carrier, and the reason therefor, the following quotation is given: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner. If they should be lost or injured by the gross negligence of the carrier or his servants, or stolen by them, the owner would be unable to prove either cause of the loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their master and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well-known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the "act of God and the king's enemies." To this must be added the

loss of goods that are destroyed by their own inherent defect, as the loss of fruit by decay although properly shipped; also, any act on the part of the bailor inconsistent with the rights of the bailee will release the latter. A loss through an "Act of God" is one brought about without any intervention of human agency. If human means are connected with the loss, the carrier is liable. The "public enemy" means a regularly organized military force engaged in war, not a mob.

4. *Special Contracts.* The severity of the law has induced the common carrier to resort to expedients to reduce or lessen his liability by entering into special contracts with the shipper. He is allowed to make a special contract lessening his liability with the shipper, but this must not excuse him or his agents from losses occasioned by carelessness or negligence. He is allowed to contract specially limiting his liability as to amount. All special contracts must be reasonable and fair, no fraud being used to obtain them.

297. Bill of Lading. A bill of lading is a contract given to the shipper by the carrier which is both a receipt for the goods and a contract of carriage. As a receipt it may be opposed by parol evidence, but not as a contract. If a special agreement is entered into by the parties, it is customary to include it in the bill of lading. The nature of a bill of lading has been fully discussed in negotiable paper. (See page 197).

298. C. O. D. Shipments. When goods are received for carriage "c. o. d.," the contract of the carrier is not only for the carriage of the goods, but to collect charges according to instructions from the consignee. These instructions may give the consignee an opportunity to inspect the goods and a reasonable time in which to pay the charges must be given. When a tender of the goods is made and refused the liability of the carrier changes from that of an insurer to that of a warehouseman.

299. Termination of Risk. The risk begins when the goods have been accepted or impliedly delivered to the carrier; it ends when the carrier delivers the goods to a connecting line

or at destination to consignee. As to whether the first carrier is liable for loss or not depends entirely upon the contract. Was the contract to deliver at the point of destination or to a connecting carrier? Some statutory enactments have made the receiving line liable for the loss rather than the connecting line.

300. Carriers of Passengers. A common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage. A passenger is one who, not being in the service of the carrier, is entitled to travel in a conveyance for the public, under a contract with the carrier, and who is within the carrier's charge under such contract.

The carrier may refuse to carry one who refuses to pay fare or purchase a ticket. He may refuse to carry those who do not present themselves at the regular stations and at proper times, also those who are dangerous in their character, condition, or health. He may also refuse to carry when he has insufficient room, or where his vehicles are not adapted to the carriage of persons. The carrier of passengers is not liable as an insurer, but he must furnish safe vehicles supplied with reasonably safe and convenient appliances, and is bound to see that his roadway and receiving and landing places are maintained in safe condition. He is required to exercise a very high degree of care and skill in carrying out the contract of carriage. He is liable for negligence in cases where the law imposes a duty upon him or in breach of his contract of carriage.

The passenger must present himself at the proper time and place, and in proper condition. He must purchase a ticket as required or pay fare in cash, and must comply with all reasonable regulations of the carrier for the safety of passengers and operation of the conveyance. If injured or killed through the negligence of the carriers, the passenger, or his personal representatives, may recover damages; but if negligence on his part contributes to the injury or death, damages are not recoverable. The passenger is entitled to take with him a reasonable amount of personal effects which are necessary for his use, convenience

or amusement during the journey. These constitute his baggage, and of these the carrier is also an insurer.

301. The Interstate Commerce Commission is a non-judicial administrative commission that is entitled to sue and be sued in its own name. It was created by an act of Congress for the purpose of minimizing the evils consequent to natural monopoly of common carriers and unfair discrimination relating to shipping in various localities. It is modeled after English legislation.

302. RECAPITULATION

A common carrier is liable as an insurer of the goods carried. He is one who makes a business of carrying goods for the general public for compensation.

A private carrier is one who carries for a limited number of persons only.

Railroads, express companies, street car companies, bus and hack lines, and ferries are all common carriers either of goods or passengers, or of both. A common carrier must carry for all alike and on a basis of rates without discrimination. He may, however, select the mode of carriage, and the line of goods he will carry. He has a right to know what he is carrying and need not accept dangerous goods.

The carrier may enforce his rights by exacting payment in advance of service, by performing the contract of carriage and then collecting his hire, and by exercising his right of lien by retention of the goods and selling the same for his charges after a reasonable time. Rates must be reasonable.

The shipping contract is called a bill of lading, and is a receipt as well as a contract.

The carrier's liability as an insurer arises on grounds of public policy from the fact that the goods are entirely out of the sight and control of the owner, and are within the complete control of the carrier and his servants. This extraordinary liability is, as a general rule, excused only by the act of God, by the act of the public enemy, or by the act of the bailor. The act of God means a force not set in motion by human agency. The public enemy is a regularly organized military force engaged in war.

The carrier may specially contract to limit his liability, but can not contract against the result of negligence.

A common carrier of persons is one who undertakes to carry all persons who apply for passage.

A passenger is one who, not being in the carrier's service, is entitled to travel in a conveyance for the public, under contract, and within the carrier's charge under such contract.

The carrier may refuse to carry those who refuse to purchase a ticket or pay fare or who do not present themselves at proper times and at regular stations.

A common carrier of passengers is not an insurer but is held to a very high degree of care.

If a passenger is killed or injured through the negligence of the carrier damages may be recovered; but if negligence on his part contributes to the death or injury no damages are recoverable.

303. QUESTIONS

Define common carriers and the nature of work performed. Distinguish between common carrier and private carrier.

What is a common carrier? Discuss his rights and liabilities. Discuss his rights to compensation, limitations, and powers to secure same. What is the reason for and extent of his ability to make special contracts?

What is a bill of lading, and what are its uses? Explain a C. O. D. shipment. When does the carrier's risk begin and when does it end?

Discuss undertaking, rights and liabilities as carrier of passengers.

What is included in the term baggage and what risk does the carrier assume?

304. DECISIONS BY THE COURTS

1. In *T v. P Co.*, 39 Md. 36, to constitute the relation of bailor and bailee, there must be evidence of title in the bailor of the property bailed.

2. In *N v. P*, 76 Mass. 366, the liability of a person who negligently receives goods not directed to him is the same as that of a bailee for hire or reward.

3. In *F v. O*, 60 N. Y. 278, the relation of bailor and bailee imports a trust and a contract, express or implied, to re-deliver the property when the purposes of the trust are accomplished.

4. In *O v. S*, 40 Ala. 372, a vendor who, after the payment of the purchase money, agrees to store and protect the property sold, and, when called upon, to deliver it at a specified place, is a bailee.

5. In *B v. T*, 28 Vt. 180, a sheriff in possession under an attachment is a bailee for hire.

6. In *R v. F*, 42 Miss. 525, a mandate is a contract by which one commits a lawful business to the management of another who undertakes to perform the service gratuitously.

7. In *B v. O'B*, 37 In. 250, a bailment of a horse without compensation does not lose its gratuitous character because the bailee pays for the keeping of the horse while he has him.

8. In *N v. S*, 33 Tex. 408, an agreement whereby a person undertakes to make a horse gentle and fit for the use of the owner's family, in consideration of permission to ride it, is a contract of hiring, and not a gratuitous loan.

9. In *F v. D*, 17 Mo. App. 232, the acceptance of an undertaking to do some act for another in respect to a thing bailed is a sufficient consideration to support the contract.

10. In *S v. S*, 3 N. Y. 588, a lodging-house keeper who rents the different floors of his house in apartments or rooms does not assume responsibility for goods of his lodgers in such rooms, as he does not take them into his custody.

11. In *L v. K*, 15 Pa. St. 172, one cannot be made a bailee without his consent, express or implied.

12. In *W v. P*, 41 Wis. 422, in case of an exchange by a bailee of the property of his bailor for other property, the bailor, upon electing to ratify the exchange, becomes vested with the title of the property exchanged for.

13. In *B v. H*, 22 Kans. 610, a bailee's mere possession of goods gives him no power to pledge them for a debt of his own without actual authorization from the owner.

14. In *E v. S*, 60 Minn. 39, a bailee entitled to the possession of the property for a specific time and purpose, may recover the value of his special interest against the owner who took possession before the expiration of such time.

15. In *M v. S*, 47 Mo. App. 182, a mere bailment to keep and care for a chattel confers no authority on the bailee to sell it.

16. In *B v. S*, 117 Pa. St. 555, when a third person claims property in possession of a bailee by assignment, sale, or mortgage executed subsequent to the bailment, the bailee may compel the parties to interplead.

17. In *R v. R*, 13 Ia. 5, the receipt by a bailee of personal property, binding him to account for it to the bailor, estops him to deny the bailor's right of possession.

18. In *G v. N*, S. 14 Ct. Cl. 544, the lawful custodian of property has an implied authority to take all needful measures for its preservation if it be in peril, and for its recovery if it be lost or stolen.

19. In *S v. M*, 44 Mo. 356, the care to be exercised by a bailee over property in his charge must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptation thereto.

20. In *St L v. D*, 6 Colo. 643, when bailors agreed that the goods should be stored in a certain warehouse at their risk and expense, their removal by an agent of the bailee's, though without their knowledge, made them liable for the safe-keeping of the goods after their removal.

21. In *D v. H*, 95 Ga. 571, the proprietor of a barber shop is liable for the loss of a customer's hat which was deposited on a hat-rack in the shop and, while the customer was being shaved, disappeared.

22. In *S v. R*, (Com. Pl.) 13 Misc. Rep. 230, 34 N. Y. Supp. 11, a restaurant keeper is not an insurer of the effects of his customers, but is only required to use ordinary care.

23. In *G v. W*, R. R., a bailee for hire may, by agreement, restrict his liability, except as to a loss occurring through fraud or want of good faith.

24. In *B v. D*, 57 N. Y. 236, when a bailee of goods, intrusted to him to do work upon them, with the knowledge and privity of the bailor employs another to aid in doing the work, and through the negligence and unskillfulness of the latter the goods are injured, the owner may maintain an action against him therefor.

25. In *K v. W*, 13 Wis. 104, when skill and care are required in the performance of an undertaking, and a party professes to be skilled in the business and undertakes to do it, he is bound to perform it in a skillful and proper manner.

26. In *H v. K*, 25 Mo. App. 574, an artificer in the absence of a custom, at common law, has a lien only on the chattel improved by his labor and in his possession, and not for a general balance for work done on other chattels. In *W v. H*, 13 Ala. 776, the bailee has power to sell them to pay expenses. In *T v. T*, 53 Ind. 93, he loses his lien when he parts with possession.

27. In *B v. C*, 64 Mo. 529, a bailee may be chargeable both with the hire of the thing bailed and its value if lost by his negligence.

28. In *S v. B*, 23 Conn. 523, materials were given to a bailee to be made into hats. The hats when completed were attached by a creditor of the bailee. Thereupon the bailor paid the sheriff the amount for which the bailee had lien thereon, and subsequently demanded possession of the hats, but was refused. Held, that the measure of the bailor's damages in trover would not be the full value of the hats but the value of the materials furnished the bailee, and the amount paid the defendant in discharge of the bailee's lien and interest on both sums from the time of the demand.

29. In *C v. C*, 149 S. W. 314 (Ark.), where money is placed in a bank in the usual way, the relation of debtor and creditor is established; and the bank has a right to mix the money with its other funds, and to use it in its own business.

30. In *C v. C*, 149 W 514 (Ark.), where money is placed in a bank for safe keeping, and not to be checked out by the depositor, or under an agreement with the bank to act as bailee or agent and deliver the money to some other person under certain conditions, or apply it to special purposes, it is a special deposit; and the bank is an agent or bailee with no right to use it or mingle it with its own funds.

31. In *H v. N*, 138 N. Y. S. 287, one who checked a hand bag at a railroad station and received a check, on the back of which in fine type was a promise that the depositor agreed not to hold the railroad liable for more than \$10, to which his attention was not called, can recover the real value of the hand bag.

305. HYPOTHETICAL PROBLEMS

1. A delivers wheat to a miller and is to receive a proportionate amount of flour, not necessarily from his own wheat. The wheat is destroyed by fire. On whom does the loss fall?

2. In the above case A is to receive the flour made from his own wheat. Who sustains the loss?

3. A leaves his horse in B's care and the horse is injured by gross negligence on B's part, B receiving no compensation. Can A recover damages?

4. A leases his horse to B for a consideration. B leaves his own horse untied and it kicks and injures A's horse. Can A recover damages in an action at law?

5. A consigns goods to B to be sold on commission. B does not sell the goods but holds them for a pre-existing debt which A owes him. Can A recover the goods?

6. Jones borrows money from Smith and leaves his watch as security. What is the nature of the bailment?

7. Jones delivers horses to Smith to be kept through the summer. Smith pastures the horses near the railroad. Smith's hired man leaves the gate to the pasture open and one of the horses gets on the track and is killed. Whose loss is this?

8. If, in the above case, the horse had leaped over a lawful fence instead of passing through an open gate, whose is the loss?

9. A delivers mahogany to B, a cabinet maker, who agrees to make him a set of furniture for \$300 to be paid for when the furniture is completed. The work is half done and the wood and

completed furniture is stolen. On whom does the loss fall for the wood? For the completed furniture?

10. A traveling salesman for a jewelry house is a guest of B, an innkeeper, and delivers his sample case to B for safe keeping. The sample case and jewels are stolen. Under what circumstances, if any, can B escape paying damages?

11. A common carrier receives goods for transportation and is robbed. Who stands the loss?

12. A flood destroys part of a railroad embankment so that fruit in transit is delayed and damaged. On whom does the loss fall?

13. A street car is running unduly fast when a passenger becomes frightened and jumps off. Who is responsible for the injury?

14. A is riding in a railroad train, in a place regularly provided for carrying passengers, and is injured by a stone thrown by a strike sympathizer. Can he recover damages from the railroad company? How, if A had been stealing a ride on the trucks?

306. SEARCH QUESTIONS

Is there any punishment prescribed for a bailee who converts the thing bailed to his own use?

In what way may an innkeeper limit his liability as to valuables belonging to his guests? For what can he not escape liability by notice? What is the nature of the lien on baggage or horses? What requirements as to doors of hotels, etc.? What are the landlord's rights as to unclaimed baggage? When?

Are there any restrictions in regard to two or more railroads combining? What is said about sinking fund? Fencing the right of way? Crossings? Warning signs? Freight and passenger cars on same train? Must the company give the passenger a check for baggage delivered? What is the law in regard to baggage smashing?

How are warehouses classified, and are they under state control? What provision is there for inspection? Separate bins for grain? What restrictions in regard to warehouse receipts? What is its standing in regard to negotiability? Is coloring or bleaching grain permitted?

Who are pawnbrokers? Rate of interest allowed? Penalty for violation? What books kept and reports made? Is there a state loan society?

CHAPTER XL

CORPORATIONS

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307. Introduction. Business enterprises as conducted to-day are so extensive in their scope and character that the capital and experience of the individual, or even the partnership, is insufficient to cope with all the varying and changing conditions. The individual and the partnership agreement present too many elements of uncertainty to be satisfactory; such matters as death, insanity, limited liability, and concentration of capital must be provided for. The corporation as it exists and is organized to-day seems to be best fitted for the demands of business as conducted at the present time.

To-day the corporation is a creature of the statutory law. It is a legal entity created for the purpose of enabling a number of persons to engage in business with limited liability, and is in reality the creation of an artificial person to whom is given certain powers, subject to certain restrictions. The great enterprises of the present day are conducted by corporations, and they are largely shaping the affairs of the country. A corporation affords an opportunity for the concentration of large capital and interests.

It also affords a man of large as well as small financial means an opportunity to invest money and to be relieved of the responsibilities of management and a liability measured by the amount of his investment.

308. Definition. It is defined by a great jurist as "an artificial being, invisible, intangible, and existing only in contemplation of law."

309. Perpetuity. Unless specifically limited, a corporation may exist forever, and this is one of the chief reasons why the corporation is such a popular commercial institution at the present time. The original members of a corporation may die or transfer their interests and new members take their places without affecting the continuity or life of the enterprise. In this particular a corporation enjoys a great advantage over a partnership.

The peculiar attribute of the corporation is the franchise, which may be simply the right to exist as a corporate business

government. It is an agency created by the state to enable districts, towns, and cities to administer public or local administrative affairs. A public corporation is also known as a municipal corporation. The State is a corporation of this class. It enjoys certain functions which are transmitted by succession in office.

(b) *Private*. Private corporations are divided into ecclesiastical and business. The former are hardly known in America, but are common in England. The latter is an association of individuals for the purpose of conducting some business enterprise for profit. Our insurance, mercantile and banking establishments are private corporations. Their powers are limited to those expressly granted by the state, and such other implied and understood powers as are necessary to their operation and existence. All other powers are denied.

(c) *Quasi-Public*. The quasi-public corporation is, as a matter of fact, a private organization, but this distinction may be pointed out: since it enjoys a certain public right or franchise to the exclusion of other companies, the law construes its rights and duties more strictly and favorably to the public as against the corporation.

311. How Created. There are three ways by which a corporation may be brought into existence; namely, by prescription, by charter under general statute, and by special statute.

1. *By Prescription*. The corporation that claims its rights by prescription asserts that it has enjoyed corporate privileges for such a length of time that the law considers that the right to exist as a corporation was given or should be given. "When a man can show no other title to what he claims than that he, and those under whom he claims, have immemorially used and enjoyed it," he claims by prescription. Such is the case with corporations by prescription, but it should be observed that in this country there are no corporations by prescription.

2. *By Charter*. A charter is direct documentary authority issued under general laws enacted by the legislative department of a state to certain persons to exercise the rights of a corporation.

It defines the rights of the corporate body, and the rule of construction is that all which is not expressly or impliedly granted is withheld. The charter is a contract between the state and the corporation and cannot be withdrawn or amended by the state unless a special reservation is included in the law or charter. The state may, however, declare a forfeiture of the charter for violation of law by the corporation.

3. *By Special Statute.* Formerly corporations were usually created by a special law enacted by the state legislature, but of late years special incorporating acts are often forbidden under later constitutions in most of the states. Many corporations, however, exist at the present day which were created in this manner.

312. Corporate Name. It is one of the general requirements that a name must be selected by those asking to be incorporated. The artificial personality of the corporation is recognized in the name under which it transacts business. This name cannot be changed except by permission of the state, and by statute in some states no two corporations in the same state may have the same name.

313. Capital Stock. The capital stock of a corporation consists of the amount of share interests issued or to be issued to the shareholders. It may be paid for in money or other property. The shares are usually one hundred dollars each face value.

314. Subscription. A subscriber is one who signs for a number of shares. His interest is a proportionate part of the capital stock. Upon the payment of the amount of the subscription, the subscriber becomes a stockholder and is entitled to a stock certificate as evidence of this fact.

315. Kinds of Stock. 1. *Common.* Common stock is the most usual kind issued, and is entitled to its per cent. of the earnings when a dividend is declared. The holders of this kind of stock are entitled to vote at all stockholders' meetings, each one being entitled to as many votes as he has shares of stock.

2. *Preferred Stock.* This class of stock is frequently issued by a company when the original issue of common stock is not sufficient to carry on the business. It is entitled to a dividend before one is paid to the holders of common stock. Frequently the dividend is guaranteed, and such stock is very similar to a bond. The holder of this kind of stock does not have the right to vote unless expressly so stated.

3. *Watered Stock.* This is an unwarranted inflation of the capital stock of a company by issuing extra stock to the stockholders, nothing in return being given for it. It is frequently issued so as to cover up large dividends, or to make the capitalization of the business such that the income is measured by the current rate of interest.

316. Liability of Stockholders. The subscriber for stock is liable for the face value of the shares subscribed for, and, in the absence of statute to the contrary, assumes no liability beyond this. His individual property cannot be taken, as in a partnership, to pay the debts of the corporation. He may, however, lose the amount which he subscribes. Creditors can only look to the assets of the corporation for the enforcement of their claims. This is one of the chief reasons why a person may be induced to risk an investment in an incorporated enterprise, for he may realize a good profit from the venture and cannot lose more than his investment. The holder of national bank stock is by statute liable for the par value of the stock in addition to the original subscribed sum; that is, in case of a failure he would be assessed not to exceed one hundred per cent. of the value of his holdings. This provision has been wisely included in the banking laws of some states.

A stockholder who receives his original stock at a discount is liable for an assessment for the difference between the purchase price and par value of the stock bought, and the liability may, by statute, continue to an innocent holder. But if stock is once fully paid it becomes non-assessable notwithstanding that the holder bought for less than par value.

317. Rights of Stockholders. 1. *To a Certificate.* When a subscriber pays for his subscription to the stock, he is entitled to a certificate showing his ownership of the stock. It is his evidence that he is a stockholder, and shows the number of shares he owns.

2. *To Sell.* Since the shares of stock are considered property, the owner has a right to sell and transfer his shares to another. The by-laws generally specify how this transfer shall be made to be effective.

3. *To Vote.* The common law gives the owner of stock, as it appears on the register, the right to vote. It is a settled rule to allow as many votes as there are shares in the organization. Generally only the owner has this right; but there are several cases where one may hold a certain relationship which carries the right to vote stock, as, a pledgee (if stock is registered in his name), trustees, executors and administrators. A corporation is not permitted to vote its own stock; for example, it cannot vote such stock as may have been taken up by the company, or treasury stock that has not been sold. Cumulative and proxy voting are creations of the statute law..

4. *To Inspect Books.* "According to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that, if this right is refused by the officers in charge, a writ of mandamus may issue in the sound discretion of the court, with suitable safeguards to protect the interests of all. It should not be issued to aid the blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course, although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of business or other serious inconveniences." This is also the law of partnership.

CERTIFICATE OF STOCK

INCORPORATED UNDER THE LAWS OF THE STATE OF WYOMING

THE EDISON ELECTRIC COMPANY

COMMON STOCK \$ 6,000,000

PREFERRED STOCK \$ 4,000,000

SHARES \$ 100 EACH

No. 43

PREFERRED STOCK

25 SHARES

This is to certify that Twenty Five Shares of One Hundred Dollars each of the PREFERRED Capital Stock of THE EDISON ELECTRIC COMPANY, a corporation under the laws of the State of Wyoming, transferable only on the books of said Corporation in person or by duly authorized representative upon surrender of this certificate duly endorsed at its Los Angeles, California, office.

The stock evidenced hereby is part of an authorized issue of Preferred Stock of said Corporation aggregating Four Million Dollars. The relations and respective rights of the Preferred and Common Stock of said Corporation are fully set forth in paragraph Fourth of its Certificate of Incorporation in the following language:

The Said preferred stock shall be preferred in the final distribution of the assets of the company up to full payment of the face thereof with cumulative dividends as hereinafter provided, and shall not be subject to the payment of the full value of the face thereof and if thereafter same remain.

To Said preferred stock shall be entitled to dividends thereupon at the rate of five per cent. per annum, beginning with the fiscal year in which the stock is respectively issued, and such dividends shall be cumulative so that if in any year the full dividend is not paid, the unpaid dividend shall be added to the dividend for the next year. If at any time after the preferred stock has received its cumulative dividend of five per cent. and if after that time still remain profits for distribution, the same shall then be distributed ratably over both the preferred and common stock. Nothing herein shall be construed to prevent the Board of Trustees of this Corporation from exercising the usual discretion in the matter of applying profits to dividends, having however regard to the holders of the preferred stock, whose dividends are declared, their right to cumulative dividends to the extent above named, in priority to dividends upon the common stock.

Witness the seal of THE EDISON ELECTRIC COMPANY and the signing of its authorized officers, this 28th day of May, A.D. 1913

SEAL

W. L. Garrison
Secretary

W. L. Garrison
President

318. Transfer of Stock. The certificate of stock represents the stockholder's holdings, and may be assigned to another in the usual way.

CERTIFICATE OF TRANSFER

For Value Received I hereby sell, assign and transfer unto
J. W. Caldwell
Twenty Shares
 of the Capital Stock represented by the within Certificate
 and do hereby irrevocably constitute and appoint
Allen R. Browning
 Attorney in fact to transfer the said stock on the Books of
 the within named Company with full power of substitution
 in the premises.
 Dated May 21 1913

In Presence of

Allen R. Brown

J. D. Gale

Notice: The Signature to this assignment must correspond with the names as written upon the face of the Certificate in every particular without addition or enlargement or any change whatever.

[From back of a Stock Certificate.]

319. How Business Is Conducted. Since one of the objects of the corporation is to draw capital from a large number of investors and from various parts of the country, it is evident that it would be impossible for the stockholders to be directly interested in the active management of the enterprise. Therefore resort is had to a body of men selected from among the stockholders and known as directors. The board of directors organizes itself and elects from among its members certain officers, as president, secretary, treasurer, and such others as may be necessary. These officers and directors are directly responsible

for the conduct of the business, and are known as the operating body of the corporation.

320. RECAPITULATION

A corporation is an artificial, invisible, intangible being, existing only in contemplation of law. It is created under statute and enables a number of persons to engage in an enterprise with limited liability. One of the chief advantages of a corporation is its long life or continuous existence.

Corporations are divided into two classes: sole and aggregate, the latter being subdivided into private, public, and quasi-public.

A private corporation is an association of individuals for the purpose of carrying on a private business for profit. Insurance, manufacturing, and banking companies are examples of private corporations. The corporate powers are limited to those expressly granted, and powers incidental or necessary to corporate existence. All other powers are denied.

A public or municipal corporation is one organized to carry on the operations of government. It is an agency of the state to administer local affairs.

A quasi-public corporation is one organized by private enterprise, but which holds itself out to perform certain functions for the general public. A railroad is an example of a quasi-public corporation. It must handle the legitimate business brought to it.

Corporations exist by prescription (in England only), by charter and by special statute. Creation by prescription arises when corporate powers have been exercised for so long a time that a corporate grant is presumed. A charter is the document of corporate organization issued under a general incorporation act.

Corporate creation by legislative act is now rare. Congress, however, is disposed to create a few of a charitable character.

The use of a corporate name is one of the chief privileges of a corporation. No two corporations, as a rule, may have the same name in the same state.

The capital stock consists of the share interests issued to the stockholders.

Stock is of two kinds, common and preferred. The difference is that preferred stock is entitled to a dividend before common stock. The term "watered" stock is frequently used to designate an inflation of capital stock.

A subscriber for stock is liable for the face value of his shares, and, as a rule, for nothing more. In case of a deficiency of assets, individual property cannot be taken to pay debts as in a partnership. The holder of

national bank stock in case of failure, however, is liable for twice the par value of his stock.

Stock may be transferred by an assignment in the manner prescribed by the by-laws of the corporation.

321. QUESTIONS

Define a corporation. Discuss the duration of corporate life. Give some illustrations of corporate franchises.

Give the different classes of corporations. Define and illustrate a private corporation; a public corporation; a quasi-public. In what three ways may corporations come into existence? Describe corporate existence by prescription.

Define a charter, and describe corporate organization thereunder. What can you tell about corporate organization by special statute? State requirements as to corporate name.

Of what does capital stock consist? How is it paid for?

Define subscriber; common stock; preferred stock; watered stock. Discuss the liabilities of stockholders; of the holder of national bank stock. How are shares of stock transferred? How is the business of a corporation conducted?

Discuss the rights of stockholders: as to a certificate; to sell his stock; to vote; to inspect books.

What difference is there in a stockholder's liability who is a subscriber and who receives his stock at a discount, and a subsequent holder who bought at a discount after stock had been issued fully paid?

CHAPTER XLI

ORDINARY POWERS OF CORPORATIONS

- 322. PERPETUAL SUCCESSION
- 323. TO ELECT OFFICERS
- 324. TO MAKE BY-LAWS
- 325. TO SUE AND BE SUED
- 326. TO MAKE CONTRACTS
- 327. DIVIDENDS
- 328. DISSOLUTION
- 329. JOINT STOCK COMPANIES
- 330. TABLE
- 331. COMPARISON OF CORPORATIONS AND
PARTNERSHIPS
- 332. RECAPITULATION
- 333. QUESTIONS
- 334. DECISIONS BY THE COURTS
- 335. HYPOTHETICAL PROBLEMS
- 336. CONSTRUCTION OF WORK
- 337. SEARCH QUESTIONS

322. Perpetual Succession. The principal advantage of incorporation is that the affairs of the concern can be definitely planned and carried out over a period of many years, notwithstanding the original members may die or transfer their interests. The life of a corporation is usually regulated by the legislative body granting the incorporative authority, and it has been very aptly compared to a river. "Although changes may take place along its shores, portions of the banks may be washed away,

and new portions may be formed, islands may sink and new ones appear, the stream may have rolled on for ages, and a thousand times its waters may have been emptied into the ocean, yet it is the same identical stream through all the changes of time. We still call it the St. Lawrence, the Rhine, or the Jordan. * * * So with a corporation. Of all the original corporators of the Banks of England and Amsterdam, not one remains on earth among the living. Generation after generation of the corporators have passed away, and yet they are the Banks of England and Amsterdam still."

323. To Elect Officers. The power to elect officers is vested in the stockholders who are generally called together by due notice at least once a year. A detailed report of the business is usually submitted for their consideration. At that time all vacancies in the board of directors are filled by ballot, each stockholder being entitled to one vote for each share owned. If several members are to be elected at the meeting, the stockholder may, if authorized by by-law, multiply the number of shares he holds by the number to be elected and vote the whole number for one director. This is known as cumulative voting. By this method of combining votes in favor of one person, a small minority may succeed in having a representative on the board.

The stock of a corporation capitalized at \$100,000 is held by two factions, one holding fifty-one per cent. and the other forty-nine per cent. The former are majority holders and the latter minority. They are, say, to elect seven directors. The by-laws and the laws of the state permit cumulative voting. If the majority should attempt to elect all seven directors from their members, they would cast 3,570 votes, or 510 votes for each candidate for a directorship. If the minority decided to nominate but four directors they would cast 3,430 votes, or 857½ votes for each candidate and would be in control of the directors' meeting. Evidently the majority attempted to elect more than their bare majority warranted. They should have attempted to elect but four members, which would have given them a majority of the directors.

The
UNITED STATES GYPSUM
COMPANY

REGISTERED

WITH

THE CORPORATION TRUST COMPANY,
JERSEY CITY, NEW JERSEY.

Proxy.—Stockholders' Meeting.

I know All Men by These Presents,

That I, the undersigned, being the owner of _____ fifty _____ shares of the capital stock of the corporation above named, do hereby constitute and appoint _____ S. Q. Fulton or C. G. Root _____ my true and lawful attorney in my name, place and stead, to vote upon the stock owned by me or standing in my name, as my proxy, at the _____ annual _____ meeting of the stockholders of the said company, to be held at the company's office, 15 Exchange Place, Jersey City, N. J., on the _____ 21st _____ day of _____ January _____ 1913, and on such other day as the meeting may be thereafter held by adjournment or otherwise, according to the number of votes I am now or may then be entitled to cast, hereby granting the said attorney full power and authority to act for me and in my name at the said meeting or meetings, in voting for the directors of the said company or otherwise, and in the transaction of such other business as may come before the meeting, as fully as _____ I _____ could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute may do in my place, name and stead.

In Witness Whereof, I have hereunto set my hand and seal the _____ 21st _____ day of _____ January _____, 1913.

WITNESS:

W. H. Kinney

R. J. Babcock

Seal

If stockholders do not personally attend the meetings of the corporation, they may, through power of attorney, direct someone to vote in their stead. This is called voting by proxy. The board thus elected, organizes and elects such officers as president, vice-president, secretary, and treasurer from among their own members. In some instances the minor offices are filled by persons who are not directors. They may also fill such vacancies as may occur before the next meeting of stockholders; but of course, only for an unexpired term. These officers are the accredited agents of and for the company, and as such transact the regular business of the company, and while doing so are not personally liable unless otherwise provided by statute. The power to remove an officer for reasonable cause may be expressly provided for, or may be at times established by implication.

324. To Make By-Laws. This legislative right is conferred on the directors or stockholders by the general law, or is established by implication. The by-laws must not be in conflict with the state laws. They are for the purpose of furnishing the members rules and regulations for the conduct of corporate affairs.

325. To Sue and Be Sued. All suits at law are brought in the name of the corporation either for or against. Service of process in actions against corporations is made as required by law, but is usually upon certain officers of the corporation. A corporation is liable for injuries inflicted by its agents.

326. To Make Contracts. The old common law recognized the right to contract, but maintained that such contracts must be evidenced by the seal of the corporation. This rule has been changed so that a seal is no longer necessary except upon contracts legally requiring a seal, although formal contracts are usually so witnessed. Contracts *ultra vires* are void. This scope cannot be enlarged by the individual members or officers. It is settled law that, within the scope of the business, all parol undertakings are enforceable against the corporation as well as sealed

contracts; and duties imposed by law, or benefits conferred, create implied contracts for which an action will lie.

327. Dividends. The board of directors has the power to declare dividends out of the earnings of the company. The dividend must be in proportion to stock or at a certain per cent. As soon as a dividend is declared, a stockholder may enforce its distribution.

328. Dissolution. There are several ways by which a corporation may be terminated; as, by statute (where the right is reserved in the act of incorporation); by surrender, by forfeiture, and by death of all its members in some cases. The statutes of many states provide for its termination or renewal at the expiration of a certain number of years, also that the charter may be changed by statute. The stockholders, through the directors, may wind up the affairs of the corporation and surrender the charter to the power that issued it in the manner prescribed by statute. The charter of a corporation may be forfeited at the instance of the state when such corporation has undertaken the exercise of powers not granted to it, as where it undertakes to create a monopoly, and as in some cases where it has failed to comply with statutory requirements.

329. Joint Stock Companies. A joint stock company is an organization that has the appearance of being a corporation, but is in reality a partnership with a large number of members or partners. Each partner who invests receives a certificate of stock as a receipt and as evidence of membership.

The organization of the corporation is followed, stockholders meetings are held, board of directors elected, and business is transacted the same as in a corporation.

The liability of the stockholders of a joint stock company is the same as that of a member of a partnership.

To recapitulate, the organization borrows from the corporation the following: stockholders' meeting, board of directors that conducts business, and shares of stock to represent capital.

330. TABLE OF COMPARISON

COMPARING PARTNERSHIP AND CORPORATION PARTNERSHIP

Time	Control	Changing Business	Name	Death of Member Insanity of Member Sale by Member	Voting	Liability	Incomplete Organization
At pleasure of partners.	By members of firm. Each one having a single vote on all questions of policy.	At any time the members see fit.	Any name they desire. May be changed whenever desired. Must not take another firm's name.	Works a dissolution of partnership.	Each member has one vote on every question.	Each member of the firm is individually liable for all of the debts of the firm.	Each member is liable individually.

CORPORATION

As per statute law or charter.	Organization by stockholders. Business conducted by board of directors.	Only by permission of granting power, <i>i. e.</i> , the State.	As selected and named in charter.	Has no effect upon standing of corporation.	In stockholders' meeting each member has as many votes as he has shares. Each director has but one vote.	No liability beyond paying for stock subscribed for. The holder of National Bank stock is liable for an assessment of 100% of his stock.	The organization is held to be a partnership, and therefore each member is individually liable for all the debts of the firm.
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In case of death, insanity, or sale of shares, the transferee takes the place of the transferrer. The stockholders are not agents of the company unless elected to the directorate, but nevertheless remains a partnership.

The joint stock company is not frequently met with in this country.

331. Comparison. Since business enterprises are conducted by both partnership and corporations, a few points of similarity and dissimilarity may be pointed out to the student's advantage. The members of a partnership may mutually extend or contract the scope of business, but the corporation has not this power as it is controlled by its charter. The individual partners are liable to the entire extent of their private fortunes for all of the debts of the partnership, while the stockholders (except as authorized by statute) are liable only for the investment made. Increased liability is sometimes imposed by statute, as in the case of national banks. The death of a partner, unless otherwise stipulated, works a dissolution of a partnership, while the death of a stockholder has no legal effect on the corporation. If a partner sells or transfers his interest in the partnership, the partnership, unless otherwise stipulated, is dissolved, while in the corporation no such effect follows. The corporation enjoys perpetual succession, while the partnership may be dissolved by the death or the insanity of a partner.

332. RECAPITULATION

The ordinary powers of corporations consist of perpetual succession, the right to elect officers, to make by-laws, to sue and be sued in the corporate name, and to make by-laws and contracts.

The power to elect officers is vested in the stockholders.

The power to make by-laws is conferred upon the stockholders or directors. By-laws must be reasonable and must not conflict with state laws.

All suits are brought for or against the corporation in the corporate name. Service of summons is made upon an officer or agent as provided by law.

Contracts must be kept within the scope of the chartered powers.

Dividends are declared by the directors out of the net earnings of the corporations.

Corporations may be dissolved by statutory limitation, by surrender of charter, or by legal proceedings to enforce the forfeiture of charter.

Any of the active members of a partnership may contract in the firm name; not so with all the stockholders of a corporation. Individual partners are liable for all debts, while stockholders are liable only for the investment made. Death or insanity dissolves a partnership but not a corporation.

333. QUESTIONS

Enumerate the ordinary powers of a corporation. How are officers elected? What is cumulative voting? Give an original example. What is voting by proxy?

Who make the by-laws? How are suits brought and defended? How are contracts made and evidenced? What are dividends and by whom are they declared?

Enumerate the different ways in which a corporation may be dissolved. Mention the difference between corporations and partnerships, setting forth the advantages and disadvantages.

334. DECISIONS BY THE COURTS

1. In *D v. W*, 17 U. S. 518, a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.

2. In *P v. B of T*, 80 Ill. 134, since the Board of Trade of Chicago, though incorporated under an act of the Assembly, is not maintained for the transaction of business or for pecuniary gain, but to promulgate and enforce among its members correct and high moral principles in the transaction of business, prescribing rules therefor which persons on becoming members pledge themselves to obey, and which it has the right to make, it is a voluntary association, with the government of which courts will not interfere.

3. In *V v. E*, 19 Mich. 187, the act, whether a general or special law, under which a corporation is formed, together with the articles of association, constitutes a charter of the corporation, and expresses the rights and franchises conferred on the corporators.

4. In *S v. St L R Co.*, 41 Fed. 736, T and A having for a small sum purchased a road bed, the construction of which cost only \$2,000, caused a railroad company to be organized, and, with others, became directors thereof, and while in this relation contracted with the directors to sell the road bed to the company for \$200,000 cash or bonds, and \$3,600,000 of the capital stock. The sale was formally ratified at a meeting of the directors, and entered on the records of the company; and afterwards the stockholders unanimously approved the purchase. At the time of the sale there were no stockholders, and the stock then issued was all that had been subscribed. The company had no property except its charter and the road bed, and the value of the notes and stock issued to T and A had no marketable value. Held, that the sale was not fraudulent.

5. In *G v. D*, 54 N. Y. 403, four persons owning land valued at \$30,000 agreed to organize a corporation, and to transfer the land to it, and commenced to solicit stock subscriptions to the proposed corporation which designated the property as being worth \$125,000. They caused fictitious subscriptions to the extent of half of the capital to be subscribed, which were never intended to be paid, and marked them as having been paid. Held, that a person subscribing to the stock of the corporation was entitled to recover the amount of his subscription from such four persons, when they received the money and divided it among themselves.

6. In *H v. T*, 8 Colo. App. 110, where an attorney is employed, by individuals seeking to incorporate, to prepare the incorporation papers, and is authorized to contract for printing, the promoters of the corporation are personally liable for such contract made preliminary to organization.

7. In *E B Co. v. E C Co.*, 155 Ill. 127, a statute which provides that the Secretary of State shall not issue licenses to two corporations having the same name is not violated by the use of Elgin Creamery Co. and Elgin Butter Co. as corporate names.

8. In *D & C F Co. v. P*, 156 Ill. 448, a charter authorizing a corporation to engage in a general distillery business in the state and elsewhere, and to own the property necessary for that purpose, gives it no power to enter upon a scheme of getting into its hands all the distillery business of the country, and establishing a virtual monopoly of the business, and for so doing it may be ousted from its franchises.

9. In *R v. P*, 91 Ill. 256, the charter of a corporation is a contract between it and the state, that it may exercise the rights and privileges conferred until the expiration of the charter, unless, by some violation of

its obligations, it shall forfeit its privileges and franchises; and, under the Federal Constitution, the obligation of such contract cannot be impaired by subsequent legislation. But a power to fix tolls means only the right to charge reasonable rates, and what is a reasonable maximum rate may be fixed by statute.

10. In *M v. D S*, 129 Ill. 403, it was held that the mode of assenting to and authenticating the act of a corporate body which uses a seal, is to affix the seal, with a declaration that it is the seal of the corporation, and to verify the act by the signatures of the president and secretary, and it was further held that a deed of a corporation having a seal, without being authenticated as required by law, is a nullity, and confers no rights.

11. In *H v. S*, 139 U. S. 419, which requires the election of directors of a domestic corporation to be held within the state, does not prevent a stockholders' meeting to increase the capital stock from being held outside the state; and where all the stockholders are present at the meeting, and agree to the increase, and receive proportionate shares of the increased stock, they cannot question the validity of the meeting in an action brought against them by creditors of the corporation to compel them to pay the par value of the stock as a trust fund for the creditors.

12. In *St L Ins Co. v. G*, 9 Mo. 149, a provision in the charter of a corporation which requires that all rules and restrictions made by the board of directors, concerning the transfer of stock, shall be subject to the general laws of the state, only requires that such rules and restrictions shall be reasonable and shall not contravene the general law of the state, other than that governing such matter as rules and restrictions are intended to govern.

13. In *K v. T*, 87 Tex. 491, where a corporation, limited as to the increase of its capital stock, to an amount not exceeding double the amount of its authorized capital, increases it to a much larger amount, the entire increase is invalid.

14. In *C v. L*, 56 N. H. 262, a corporation cannot reduce its capital stock by purchasing the shares belonging to one stockholder, but each stockholder should be allowed to surrender the same proportion of his stock as the aggregate of the capital stock.

15. In *H v. A*, 34 Md. 316, in order to avoid a contest of subscription to the capital stock of an incorporated company, it must appear that such subscription was made upon the faith of false representations in regard to a matter of fact material to the success of the enterprise. The mere holding out of flattering prospects by an agent of the company is no ground of avoidance.

16. In *S v. R*, 74 Ga. 435, where, by fraud on the part of the insolvent stockholders of a corporation, plaintiff was induced to put his money into it, and to become a stockholder and president, equity will relieve him by severing his connection and decreeing a recovery; nor need he before suing ask relief of the stockholders who perpetrated the fraud.

17. In *S v. St L*, 29 Md. App. 301, while a shareholder's right to inspect the books of a corporation cannot be exercised by appropriating them to an unreasonable extent, and to the detriment of the interests of the corporation, the latter cannot deny the right on the mere plea that it would be inconvenient to grant it.

18. In *R v. P*, 71 Mo. 128, the managers of a company, supposing it to be duly incorporated, incurred liabilities pursuant to the authority given them by their associates. It appeared subsequently that the company never became incorporated. Held, that the associates of the managers must bear their pro rata share of the loss; and that subscribers who had paid for their stock in full, or had paid the double liability to which stockholders were once subject, were not exempt from further contribution, but, on the contrary, should be allowed for such payments.

19. In *F v. B*, 7 Fed. 785, when defendants subscribed and agreed to pay certain sums of money towards the increased capital stock of a corporation, with the understanding that they were to receive stock therefor at 66⅔ cents on the dollar, and this arrangement was carried out, and certificates for the stock delivered to them, held, that the assignee in bankruptcy of the corporation might still collect the remaining one-third of the par value of the stock for the benefit of its creditors.

20. In *P v. R Co.*, 121 N. Y. 582, a trust case, wherein several corporations formed a partnership to regulate, control, and distribute profits of the several concerns, it was held illegal. The court said: "To justify forfeiture of the corporate existence, the transgression on the part of the corporation must be not merely formal and incidental, but material and serious, and such as to harm or menace the public welfare; for the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action."

335. HYPOTHETICAL PROBLEMS

1. There is a firm incorporated under the name of The Libertyville Creamery Association. Another wishes to incorporate under the name of The Libertyville Butter and Cheese Associ-

ation. Discuss the probability of the state issuing a charter to the new company.

2. An association of several corporations is formed for the purpose of dividing up the territory and fixing prices. Discuss the standing of this agreement.

3. A corporation is being formed by three interested parties. In order to secure subscriptions they sign for more than they intend to pay for and also add the names of two well known financiers for a block of stock. Finally the stock is over subscribed and they withdraw the two names mentioned above and reduce their own subscriptions. The incorporation is then effected. Discuss standing, the conditions becoming known to all.

4. A corporation whose stock is part common and part preferred finds that it has made a large profit. It pays the regular preferred dividend, but does not declare a dividend on the common stock although it has a large surplus. Discuss rights of the common stockholders.

5. In the settlement and winding up of the affairs of a corporation, discuss the order of paying the following liabilities: common stock, bonds, bills payable, preferred stock, personal accounts payable, taxes due the government. The capital stock of the company is \$100,000, one-half in each kind of stock named. There is a shortage of \$15,000 in paying the several claims.

6. Five parties subscribe for the stock with the intention of forming a corporation for the manufacture of household furniture. The company is formed and started, but at the end of the year the assets are exhausted and the company closes its doors. There are debts due creditors aggregating \$10,000. It develops that while all the steps of incorporation were taken, the articles of incorporation were never issued. Discuss rights of stockholders and creditors.

7. In a certain corporation cumulative voting is allowed. There are 2,000 shares of \$100 each. The stock is held by two

groups, one owning 71% of the issue and the other 29%. There are nine directors to be elected. The minority desire to nominate and elect as many directors as possible. How many shall they nominate?

8. Again, as above, but the stock is held by 55 per cent. and 45 per cent. divisions, and the majority nominate and attempt to elect six members. Under these conditions how many may the minority nominate and elect?

9. A stockholder in a corporation is dissatisfied with the financial reports sent out to the stockholders and statements made to the general public. He demands the right to examine the books and to make use of a public accountant in so doing. Discuss the rights of the corporation and the stockholders in this case.

10. Two firms are A B C & Co., incorporated, and A B C & Co., not incorporated. They each fail in business with liabilities of \$150,000 and assets of \$50,000. In each firm B is a millionaire, while the other members of each firm have all their property invested in the business. State what the creditors may expect in each case.

336. CONSTRUCTION WORK

Write up the following by-laws. It is suggested that the student get a set of by-laws of some corporation that he knows.

By-Laws of the Co.

Directors

Number term of service successors qualified.

Vacancies, how filled meetings of board number to be quorum.

Officers

The officers shall be Compensation Board of Directors to elect officers. Vacancies.

President

Member directorate presides other duties.

Vice President

Treasurer

Custody and responsibility of funds furnish bond expense paid by company supervision of books submit annual report.

Secretary

Keep record minutes of stockholders' meetings record of votes direct the correspondence transfers of stock timely notices of meetings other duties.

Meetings

Annual meeting of company where held time of day notices 20 days before meeting also publication of notice special meetings of directors on 10 days' notice statement of business whenever stockholders want a meeting. No other business quorum at stockholders' meeting.

Dividends

Direction of directors, etc.

Seal

Describe it.

Amendments

By-Laws to be amended.

Parliamentary Law

All questions to be settled by manual.

Other Provisions

Order of Business

Roll call. Reading reports, officers, committees, etc., etc.

337. SEARCH QUESTIONS

To what state officer should application be made for incorporation papers?

How are corporations classified? By whom are the by-laws made? By whom are the directors elected? How many incorporators are required?

What is the maximum and minimum number of directors allowed in your state? For how long may a company be incorporated?

What are the statutory requirements in regard to recording papers in the county where the principal office is located? What are the requirements in regard to a principal office? What are the requirements in regard to stock subscriptions? What proportion must be subscribed before incorporation can be completed?

What different kinds of stock are authorized? Is treasury stock permitted? If so, how is it held? What are the provisions as to stockholders' liability? Must stock be fully paid for when issued?

What is the effect when a corporation fails to comply with all the organization requirements? What is the standing of an oral contract for the sale of stocks or bonds? May a corporation like a mine or a railroad company own and operate a store? Are special charters granted by the state legislature? May a corporation owning stock in another corporation, of the same state, vote the stock? Does the state tax the capital stock of the company, or only its assets?

What showing is required to prove non-participation in a monopoly or trust? What things are necessary to procure a receivership?

How are the affairs of a corporation whose charter has expired by lapse of time closed out? Mention some statutory grounds for forfeiture of charter at the suit of the state. What formalities are required of a foreign corporation before it can transact business in your state?



EDWARD D. WHITE

EDWARD D. WHITE

Chief Justice of the United States; appointed Associate Justice of the Supreme Court in 1894, Chief Justice in 1910.

There are three momentous periods in American jurisprudence: first, constitutional construction, second, constitutional reconstruction, and third, public policy versus consolidation and integration of business interests. The first has its Marshall, the second its Chase, and the third its White. Questions of immense importance to humanity are being settled by the Supreme Court at the present time, questions revolutionary in their character in so far as gigantic business enterprises are concerned. The present Chief Justice has this to say of the court over which he presides:

The most powerful court of the world. It is the only one that can nullify an act of the people of the nation, or the peoples' representatives. Ours is the only nation in which the Supreme Court assumes to be a co-ordinate branch of the government. It is the more remarkable that a popular government should be the one in which the most powerful and the one completely irresponsible department of government has no direct connection with the people.

CHAPTER XLII

FIRE INSURANCE

- 338. INTRODUCTION
- 339. FIRE INSURANCE
 - 1. Parties
 - 2. Subject Matter
 - 3. Consideration
 - 4. Agreement
 - 5. Risk
 - 6. Losses
- 340. INSURANCE IN SEVERAL COMPANIES
- 341. ASSIGNMENT
- 342. NEGLIGENCE
- 343. RECAPITULATION
- 344. QUESTIONS

338. Introduction. The subject of insurance as treated in this chapter deals solely with insurance of personal property and buildings. The insurance company offers to the business man protection against certain losses. By securing small sums, called premiums, from many, it assumes the risk of protecting the many, knowing from experience that the losses will fall on but a few, and from careful estimates that the many small sums will exceed the few partial or whole losses, and leave a profit to the insurer. While there are several classes of insurance, the following are the most important: fire, life, and marine.

339. Fire Insurance. This is an undertaking on the part of the insurance company to indemnify the insured in case of loss or damage by fire.

1. *Parties.* The parties to an insurance contract are known as insurer and insured. The insurer is generally a company

organized under the insurance laws of the state for the express purpose of conducting the insurance business. The two chief classes of companies are the mutual and the stock companies. A *mutual* company is composed of property owners who desire insurance, and the premiums are paid in the form of assessments which are levied only to pay losses and to defray ordinary expenses. If there are no losses, the assessments are only nominal—just large enough to cover the incidental expenses. A great deal of insurance in this country is carried by mutual companies or associations.

A *stock* company is an incorporated insurance organization charging a regular fixed rate or premium for the protection afforded, and this rate is intended to meet losses and pay dividends to the stockholders.

2. *Subject Matter.* Any personal property may be the subject matter of an insurance agreement, but the insured must have an insurable interest. The insured may possess a full title or a partial one; that is, he may be the absolute owner, in part or in whole, or he may be one who holds only a mortgage or other lien on property. The whole interest or the several partial interests may each be a separate subject matter, and one policy may cover the entire property running to each, as his interest may appear, or each may have a separate policy.

It is the general rule in this country that the insurer's interest in the goods must be disclosed; goods held by a trustee, or by a commission merchant, must be insured as such.

3. *Consideration.* The contract of fire insurance requires a consideration. This is usually a certain per cent. of the value of the property, or of the amount insured, and is called the premium. The premium rate varies with the risk; the greater the probability of loss, the greater is the cost of insurance. A structural steel building used for offices will be insured against loss by fire at a lower rate than a less modern building filled with inflammable material. The rate is established in most of the large cities by a board of underwriters. All companies, therefore, charge the same rate on the same risk. If the risk increases or decreases

during the term of insurance, an additional premium will be charged or a rebate given.

4. *Agreement.* The agreement of the parties is evidenced in a contract called a policy. In this contract are included the usual elements of a written contract, and many special clauses are added, nearly, if not all, being restrictions in favor of the company. In making application for insurance, where one is required, the applicant is required to answer in writing a number of questions and his answers are known as representations, conditions, and warranties.

Representations are statements in writing, and are usually considered a part of the policy. If a material representation is false, the policy is void. A condition is expressly a part of the policy. It generally relates to the use of the building, changes, etc., and has a direct bearing upon the force and effect of the policy. A warranty is an express promise or undertaking, and is a part of the policy. The effect of these various statements and clauses is to impose upon the insured the exercise of the utmost good faith in all his dealings with the company.

5. *Risk.* The risk taken by the company arises from possible loss or damage by fire; but the policy may contain clauses relating to other risks, as, for example, loss by lightning and by tornadoes. Loss by fire includes all losses incident to extinguishing the fire. The loss is the value of the goods at the time of the fire. Fire insurance is strictly one of time, beginning on a certain date and expiring at a certain time. It is customary for the risk to begin at noon and terminate at noon. The risk, with the consent of the company indorsed on the policy may be transferred from one stock of goods to another, also to cover the same goods when transferred to another place. When a partial loss occurs and is paid, the amount of the policy is reduced accordingly.

6. *Losses.* The policy usually stipulates that when a loss occurs, the company shall be notified in writing within a specified time. In the adjustment of losses, the policy usually provides the method of settlement, and it is usually optional with the

company as to whether it will pay the loss or repair or re-supply.

A clause now frequently included is the one of co-insurance, whereby the insured is a co-insurer to the extent of the value of the property not insured.

340. Insurance in Several Companies. When the property offered for insurance is of great value, it is customary to re-write the insurance. One company may place the whole risk and re-insure the whole or a part, or a company may limit the amount of insurance it will assume, necessitating placing applications with several companies. Such insurance is generally negotiated by insurance brokers. Losses under such a policy are divided *pro rata* among the various companies issuing the policies.

341. Assignment. While an insurance policy represents a right and is therefore a chose in action, its assignability is controlled by the company, and an assignment can only be made with its consent. Policies usually contain blank assignments that may be filled out showing the consent and agreement of all parties interested.

342. Negligence. As a general rule, one's negligence contributing to or causing damage is a bar to an action. Yet in fire insurance this is not the case. Insurance is to protect one against his own carelessness as well as various other causes of loss. The company must pay even when the loss was caused by the carelessness of the insured. However, one must not actively contribute intentionally to produce a loss, as this is fraud.

343. RECAPITULATION

The principal kinds of insurance are fire, life, and marine insurance. Fire insurance is an undertaking by an insurer to indemnify a property owner against loss by fire.

A mutual company is an association of property owners all of whom are insured, and against whom an assessment is laid whenever a loss occurs.

A stock company is an incorporated organization which charges a fixed rate for the protection afforded and out of the proceeds pays losses and dividends.

Any personal property may be insured, provided the person who takes out the insurance has an insurable interest.

The consideration paid for insurance is called a premium, and the contract itself is called a policy.

Premiums may increase or decrease during the term of insurance as conditions surrounding the property change.

A representation is an oral or written statement, made when the insurance is procured, not a part of the policy but avoiding it in case the statement is material and false.

A condition is an express part of the policy which restricts the use of the property insured or in some way limits the rights and privileges of the owner.

A warranty is an express promise or undertaking on the part of the insured and is a part of the policy. Representations in the application are often made warranties.

The risk is the possible loss assumed by the insurer.

Time is strictly of the essence of all fire insurance contracts; that is, the contract begins and ends at a precise instant.

Where a company undertakes the entire risk upon a property of great value, it is not unusual for it to protect itself by reinsuring a part of the risk in other companies.

Upon consent of the insurer, a policy may be assigned.

By gross and intentional negligence the insured may lose his rights under the policy.

344. QUESTIONS

Mention the most important kinds of insurance. What is fire insurance? How are the parties designated?

Describe a mutual company; a stock company.

What may be the subject matter of insurance? What is the consideration?

By whom are insurance rates fixed?

What is the agreement called and what are the elements?

Define representations; condition; warranty.

Discuss risk. How is it affected by the element of time?

What is insurance?

Are insurance policies assignable?

How does carelessness by the insured affect his right to recover for a loss?

CHAPTER XLIII

LIFE INSURANCE

345. INTRODUCTION

1. Parties
2. Application
3. Who May Insure
4. Policy
5. Amount
6. Premium
7. Assignment

346. RECAPITULATION

347. QUESTIONS

345. Introduction. The business of life insurance is generally carried on by regularly organized associations that make this their sole business. The companies are very similar to fire insurance companies, and the terms and conditions of issuing policies are governed by the same general principles.

1. *Parties.* The parties to a life insurance contract are two in number, the insurer and the insured. As in fire insurance companies, the insurer may be an incorporated association for mutual protection, or an incorporated stock company organized for the purpose of affording protection to those applying and at the same time of producing profits for the stockholders. Many secret and partially secret societies have insurance departments that are a mutual benefit association. The cost of insurance in such a company is slight, or should be. The cost is proportioned to the loss by death. Stock companies are incorporated, and charge a regular rate for the protection. The rate is based on past experience and on the age of the insured. The companies produce profits from the premium charges, lapses, and the careful investment of capital.

2. *Application.* This is usually a written statement signed by the insured, containing in addition to the application the answers to a list of questions relating to the age of the applicant, his general health, his ancestors and their general health, if living, and if not, the cause of death.

This application becomes a part of the contract between the parties and is a warranty. The questions must be truthfully answered, or the policy may be avoided by the company and all payments forfeited. "The word health, as ordinarily used, is a relative term. It does not require absolute perfection. The most important question on applications for life insurance is, whether the applicant is exempt from any dangerous disease, i. e. one which terminates fatally."

3. *Who May Insure.* To begin with, all sane persons have an insurable interest in their own lives. A substantial pecuniary interest in the life of another is sufficient on which to base insurance. To allow one to insure the life of a person otherwise would be to encourage wagers of an objectionable character. A creditor has an insurable interest in the life of his debtor. Not only may the creditor so insure, but if the debtor dies, he may collect on the contract with the insurance company, and he may also recover payment of the debt from the estate of the deceased. Children or parents dependent upon each other have such an interest. If the interest exists at the time the contract is made, it is immaterial whether it continues or not, as a creditor may insure the life of his debtor and still collect the insurance even though the debt was paid subsequent to taking out the insurance. In this, life insurance differs from fire insurance contracts. The insured may apply for insurance in his own behalf payable to himself or his estate, or he may make it payable to any one who has an insurable interest, and such person at once acquires a complete interest in the insurance contract. The one in whose favor the insurance is taken is called the beneficiary.

4. *Policy.* As in fire insurance, this is the written contract setting forth the terms and the stipulations relating to and in any way affecting the contract. Policies usually contain restrictions

relating to travel and occupation. Many occupations are extremely hazardous, and for this reason the applicant engaged in one of these occupations may be rejected, or, if accepted, an additional premium may be imposed. Engineers and firemen are so classed. A clause relating to suicide is usually included, avoiding the policy in case of the suicide of the insured. Many companies waive this clause after a policy has been in force a certain time, as it is not probable that one would apply for insurance and contemplate suicide several years hence. If the insured dies at the hand of justice, the policy by stipulation fails.

5. *Amount.* There is no limit to the amount of insurance one may carry provided the premium is paid.

6. *Premium.* This is the sum charged by the insurance company for the risk it assumes and is the consideration that binds the parties to the contract. The amount of premium depends upon the plan of insurance. Three general plans are recognized, ordinary life, term, and endowment. In all cases the amount of the premium is determined by the age of the applicant, and does not increase in subsequent years under the policies of the "old line" companies. In the ordinary plan, only the protection afforded by insurance is considered, and the premium is paid throughout the life of the insured. The premium rate for insurance of this kind is the lowest of any life insurance. In the term plan, the agreement is for a number of years, and the rate of premium is higher than in the ordinary plan. In an endowment policy, two elements are considered—the protection, and the accumulation of profits. This is the highest in point of cost. At the end of the endowment period, a certain sum is payable to the insured, or to his beneficiary, if he should die before that time.

7. *Assignment.* The one holding the beneficiary interest has an assignable interest which he may transfer by means of an ordinary assignment. Policies are frequently used as collateral security, particularly endowment policies.

346. RECAPITULATION

In organization and management, life insurance companies in general are similar to fire insurance companies. In addition, many secret so-

cieties provide insurance for their members, at a reduced cost, upon the mutual benefit plan.

The applicant for life insurance must give a short health history of himself, his immediate ancestors and his nearer collateral relatives. This is a part of the contract and if not true may become the means of avoiding it.

Life insurance may be procured by the insured himself, by a member of his immediate family, or by any one who has a pecuniary interest in his life.

The policies usually contain restrictions as to travel and occupation. If the premiums are paid there is no limit to the amount of insurance one may carry.

The three principal kinds of life insurance are ordinary life, term, and endowment.

The amount of the premium varies with the kind of insurance and the age of the insured.

The beneficiary under a policy may assign his interest.

347. QUESTIONS

What statements does an application for life insurance usually contain? What is the effect of false answers to questions contained in the application? Who may insure and under what circumstances? Must insurable interest continue? Who may be beneficiaries?

What are the usual restrictions found in life insurance policies? What amount of insurance may a person carry? What is the premium and upon what does the amount depend?

What are the three general plans of life insurance?

Under which plan is the premium lowest? Highest? Is a life insurance policy assignable?

CHAPTER XLIV

MARINE INSURANCE

348. INTRODUCTION

1. Time
2. The Risk
3. Insurable Interests
4. Policy
5. Warranties
6. Misrepresentations
7. Abandonment

349. CASUALTY INSURANCE

350. RECAPITULATION

351. QUESTIONS

352. DECISIONS BY THE COURTS

353. HYPOTHETICAL PROBLEMS

354. SEARCH QUESTIONS

348. Introduction. The business of marine insurance is much the same as that of fire insurance. It is carried on largely by incorporated companies. The subject of marine insurance is very extensive and abounds in technicalities. A careful study of the subject must be made to become thoroughly conversant with it.

1. *Time.* The contract of marine insurance is strictly one of time; it may be for a specified time, as for one year, or it may be for a particular voyage. Both the vessel and goods may be insured. If the vessel deviates from the regular voyage the policy will be avoided, unless the change was from necessity. Deviation is frequently a necessity, as in case of seeking needful repairs.

2. *The Risk.* The risk is that of loss by fire and the perils of the sea. The common carrier is liable for the ordinary losses

caused by negligence; he warrants safe carriage, but does not insure against the extraordinary losses. The contract of marine insurance covers all losses, as fire, perils of the sea, piracy, capture, and extraordinary losses. The latter even includes general average, which is an assessment made where it becomes necessary to throw overboard a part of the cargo to save the rest, the sacrifice being successful.

3. *Insurable Interests.* As is the case in fire insurance, the one applying for marine insurance must be an owner or at least possess an interest in the goods. Since goods are frequently sold after insurance, the consent of the company to the transfer must be secured; but this is obviated at times by making the policy read "for the benefit of all whom it may concern at the time of loss."

4. *Policy.* The policy is the written agreement between the parties signed by the insurer, but binding both parties. The premium is the consideration given in securing the insurance, and is at a certain per cent. of the value of the goods insured. The amount is the sum agreed upon by the parties and may cover the value of the goods, freight charges and profits of the venture. In case of loss the amount paid is determined by proportioning the value of the goods, freight charges, and profits of the venture. but one-half of the value is covered by insurance, the company will pay but one-half of any loss. When the insurance is placed after the voyage has commenced, the policy usually contains the clause "lost or not lost," and even though the goods or ship were lost before the time of placing the insurance, such a clause is binding upon the insurer.

5. *Warranties.* Warranties affecting the policy may be express or implied, and are a part of the policy. Express warranties are express stipulations relating to the undertaking. It is needless to say that all such warranties must be true or the policy will be of no force. An implied warranty exists that the vessel is seaworthy at the time the insurance contract is made or voyage begun, and that the ship is properly equipped and manned.

6. *Misrepresentations.* Misrepresentations affecting policies may be classed as fraudulent, and as the result of negligence, mistake or accident. If of the former nature, the contract is null and void, irrespective of the materiality of the fraud. If of the latter kind, it is a question whether the negligence, mistake or accident is of a material or immaterial aspect. If material, the consequence will be disastrous to the standing of the policy, if immaterial, the policy is in no way affected. It is the duty of the applicant for insurance to make full and truthful disclosures as to the exact condition of the cargo and freight, particularly so in regard to all material conditions, and it is not for him to determine whether they are material or immaterial.

7. *Abandonment.* This is a right, peculiar to marine insurance, whereby the insured in case of loss transfers or abandons to the insurer the title to all the goods remaining. From the stand-point of the insured it is now considered a total loss. In order to exercise this right, the loss must exceed one-half of the value of the goods.

349. Casualty Insurance. Another class of insurance that is very popular at the present time, particularly so in the large cities, is known as casualty insurance. In this class of insurance indemnity against an innumerable number of losses and accidents is offered. Examples are insurance against losses caused by explosions of boilers, defects in elevators, theft of goods, dishonesty of employees, automobile and plate glass insurance. In fact, indemnity is now offered in almost all instances where loss may follow.

350. RECAPITULATION

Marine insurance is strictly a time contract.

Deviation from the regular voyage will avoid the policy, unless the change of course is compelled by necessity.

Marine insurance covers not only losses by fire, perils of the sea and piracy, but extraordinary losses.

The insured must have an insurable interest.

The policy may be assigned with the consent of the insurer, or the policy may read "for the benefit of all whom it may concern at the time of loss."

The policy is the written contract of insurance between the insurer and the insured.

Insurance may be taken out after the voyage has begun and is binding even though the vessel at that time may have been lost.

The insured impliedly warrants that the vessel is seaworthy at the beginning of the voyage.

Fraudulent misrepresentations render a policy null and void; misrepresentations arising from negligence, mistake, or accident, if material, avoid the policy, but if immaterial, they produce no effect.

In marine insurance, if there is more than a half loss the insured may abandon the entire property to the insurer.

351. QUESTIONS

Mention an important element in marine insurance. What may be insured under a marine policy? What is the effect of deviation in voyage? What does the risk include? What is general average?

What effect does the sale of the cargo have after procuring the insurance? What is the construction of the "lost or not lost" clause in a policy?

Distinguish between express and implied warranties in a policy. Distinguish between fraudulent misrepresentations and those arising from negligence, accident, or mistake. What is the right of abandonment? What are the subjects in casualty insurance?

352. DECISIONS BY THE COURTS

1. In *H v. P*, 107 Ala. 276, in the absence of a statute requiring incorporation, citizens of the state acting as individuals or associations, may conduct insurance business in the state without being incorporated; and, under the Constitution of the United States, such privilege inures to citizens of other states.

2. In *B v. Mc C*, 36 Colo. 542, the fact that a life assurance company is to pay the assured the agreed sum at the expiration of ten years, even though the assured be living, does not divest the policy of its character of "life insurance."

3. In *P v. Ins. Co.*, 153 Ill. 25, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois.

4. In *B v. Ins. Co.*, 68 Ind. 347, a policy is not void, though issued by a company which has not complied with the statute authorizing it to do business in Indiana.

5. In *S v. Ins. Co.*, 10 No. App. 580, the penalty for doing a life insurance business by a foreign company after its exclusion from the state applies to the agents, and not to the company.

6. In *B v. M.*, 82 Md. 535, since the insolvency of an insurance company is a breach of contract, the policy holders are entitled to recover the insurance premiums.

7. In *C v. H.*, 12 Iowa 287, it may be said generally that any interest may be insured if the peril against which insurance is made would bring upon the insured, by its immediate and direct effect, a pecuniary loss.

8. In *P v. T.*, 93 Ala. 255, a person engaged in moving houses has an insurable interest in the houses which he is moving, to the extent of the compensation which he is to receive.

9. In *P v. F.*, Fed. No. 10900, the right of the master of a vessel to primage on freight is an insurable interest.

10. In *L v. E.*, 72 Mass. 396, a father has an insurable interest in the life of his minor son, but in *G v. H.*, 80 Ill. 35, a child has no insurable interest in the life of a parent, unless it has a reasonable expectation of pecuniary advantage from the continuance of the parent's life.

11. In *S v. H.*, 15 Fed. 707, a contract for insurance against loss by fire is a contract of indemnity, and a contract to that end with a person who has no insurable interest in the property, or cannot sustain any pecuniary loss by injury thereto, is a mere wager, contrary to public policy and void.

12. In *App. of C.*, 113 Pa. 438, it is wholly unnecessary to prove an insurable interest in the life of the assured at the maturity of the policy if it was valid at its inception; and, in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery.

13. In *S v. Ins. Co.*, Fed. No. 12560, no precise form of words is required to create a contract of marine insurance, and if the words used express it, with the intention of the parties, it will be sufficient.

14. In *Ins. Co. v. C.*, 56 Iowa 508, in an action on a policy of fire insurance, it appeared that the assured had agreed with the agent of the company that the insurance should take effect at a certain time, at a specified rate, but that the policy was not actually issued till after the fire. Held, sufficient to show a valid parol contract for insurance, and the company is liable.

15. In *M v. Ins. Co.*, 126 Mass. 158, an application for life insurance was made to an insurance company, which it found satisfactory; and it wrote a policy based on the application and sent the policy to its agent, who offered the policy to the person making the application for inspection. The premium called for by the terms of the policy was not paid, and the policy was not delivered. Held, that an action could not be maintained against the company under any form of declaration.

16. In *Ins. Co. v. D*, 16 Ky. 398, when insured has given a note to the agent in his representative capacity for the first premium of life insurance, the policy will be avoided on failure to pay such note at maturity, under a provision providing for forfeiture in case of failure to pay notes given for premiums at maturity, notwithstanding a receipt has been delivered to insured acknowledging payment of the cash premium.

17. In *Ins. Co. v. B*, 27 Ark. 539, the phrase "lost or not lost" in a policy of insurance evidences an agreement that the insurers shall be responsible for any loss which may have already happened when the policy was made.

18. In *G v. Ins. Co.*, 18 La. Ann. 97, each stipulation, whether printed or written, in a policy of insurance, should have effect, unless the giving effect to one would destroy another, and then the printed must yield to the written stipulation.

19. In *Ins. Co. v. M*, 2 S. W. 443, a pamphlet issued by the chief officers of an insurance company, containing representations as to its places of insurance, and by means of which contracts are secured, is to be regarded as a part of the contract.

20. In *B v. T*, 24 (Wend.) N. Y. 276, a policy on account of is equivalent to a policy for whom it may concern, and proof aliunde may be given to show the real parties in interest, and an action for money had and received lies in favor of one interested, to recover his proportion of a loss paid to others.

21. In *E v. M*, 1 Mo. App. 192, where goods are insured on "memorandum" or open policy, entries of shipments made on the blank book to which the policy is attached are as valid as if made on the sheet on which the policy is written.

22. In *R v. Ins. Co.*, 80 Iowa 563, the term "household furniture" in a policy, when not otherwise restricted, includes all articles necessary and convenient for housekeeping, such as sausage mill, churn, cook-stove, dishes, kettles, etc., not particularly specified.

23. In *H v. Ins. Co.*, 32 N. Y. 405, when a fluctuating stock of goods was insured by a mercantile firm, and one of the members retired, it was held that goods subsequently purchased by the continuing members of the firm, who acquired the interest of the retiring partner, were within the protection of the policy.

24. In *W v. Ins. Co.*, 24 Fed. 767, a valued policy is one in which the value of the property insured is fixed and agreed upon by both parties to the contract, and in case of total loss it is not necessary that proof should be made of the market value at the time and place of shipment.

25. In *S v. Ins. Co.*, 21 U. S. (Wheat) 268, a policy of insurance is assignable in equity, and every set-off between insurer and insured, prior to the assignment, is good against the assignee.

26. In *C v. S*, 29 Pa. 31, where a risk is estimated and taken on the faith of representations made by the insured, the law requires that his representations shall truly and completely express his knowledge of the dangers to which the property is exposed, and the contract is avoided if they do not.

353. HYPOTHETICAL PROBLEMS

1. A member of a corporation has corporate property insured in his favor. Discuss the standing of the policy.

2. A owns property. He mortgages it to B, who assigns it to C. A, B, and C each successively apply for and receive insurance on the property. Discuss standing of these policies.

3. A's household goods are on the first floor, and are badly damaged by water used in putting out a fire on the top floor. The goods were insured. Can he collect for the loss?

4. Same as in 3, but the insurance patrol remove the goods to the street, where they are damaged by a rain immediately following. Does the insurance cover the loss? What if some of the goods were stolen while in the street?

5. Insurance to the amount of \$5,000 is issued to B, a statement being included in the application that there is no building within 100 feet. After the policy is issued, a building is erected on an adjoining lot within 50 feet. Does this affect the standing of the policy?

6. The board of underwriters provides in a certain town that unless 80% of the value of the building is covered by the policy of insurance the amount paid on a loss shall be but a proportional amount of the loss.

The following losses are reported:

Valuation \$90,000, insurance \$75,000, loss \$10,000.

Valuation \$80,000, insurance \$30,000, loss \$2,000.

In each case, how much will be paid by the company?

7. A has a building valued at \$25,000, 80% clause applying, insured in three companies as follows: In A \$8,000; in B \$7,000; and in C \$5,000. The building is damaged to the extent of \$10,000. How much is to be collected from each company?

354. SEARCH QUESTIONS

Who may conduct an insurance business? What limitations are placed upon a company buying and selling goods? What restrictions are placed upon foreign companies doing business in another state?

How must insurance business be placed? What are the regulations in regard to the investment of capital? What real estate may a company hold? What is the nature of the required annual report, and to whom must it be made? What is done with the annual report? What officer has oversight of companies? What limitation is placed upon reinsurance?

Under what conditions may a charter, or license, be revoked?

Is there any authority to form mutual companies? What are the restrictions? How is the amount of premium determined?

What are the regulating conditions and provisions concerning life insurance companies?

Give a form of statement for accident companies.

What provisions are made for insurance in case of accidents to employees?

CHAPTER XLV

REAL PROPERTY

355. INTRODUCTION

356. KINDS OF REAL PROPERTY

1. Lands
2. Tenements
3. Hereditaments
 - (a) Corporeal
 - (b) Incorporeal

357. TENURE

358. RECAPITULATION

359. QUESTIONS

355. Introduction. Real property is such as has permanency of location, and includes lands and rights issuing out of lands. As an exception to this may be mentioned leasehold interests and real estate liens, which are personal property but which from their intimate relation to real property are usually treated in that connection. Blackstone divides the subject of real property into four parts; namely, kinds of real property, tenure, estates, and titles.

356. Kinds of Real Property. All real property is comprehended under the terms lands, tenements, and hereditaments.

1. *Land* is the soil of the earth, and includes everything erected upon, or attached to its surface, or which is buried beneath. In theory it extends indefinitely upwards and downwards, embracing buildings of a permanent character, trees and minerals.

2. *Tenements* are those things which can be held. The word is of feudal origin and application, and need not be further treated here.

3. *Hereditaments* imply any property which is inheritable. They are of two kinds, (a) corporeal; that is, things of a material or substantial nature, such as lands, mines, etc.; (b) incorporeal, or those kinds of real property which are intangible and which are rights in or issuing out of the real property rather than to it, such as easements, rents, franchises, etc.

357. **Tenure.** The conditions and terms, and the rights and obligations arising out of the holding of land, constitute tenure. The term is used "to designate the specific feudal lord and his tenant, it being based on a grant by the lord of the land to be held by the tenant on condition of the rendition of certain services." The consideration of this branch of the subject of real property, while very interesting from an historical viewpoint, has no practical application in a treatise of this kind. The student is referred to the writings of Blackstone and Kent.

Having now defined the subject of real property, and having briefly considered kinds of real property and tenure, we are now ready to treat the two most important branches of the subject; namely, *estates* and *titles*.

358. RECAPITULATION

Real property has permanency of location. In law the subject is divided into kinds of real property, tenure, estates and titles. All kinds of real property are comprehended under lands, tenements and hereditaments.

Land is the soil, etc., of the earth and everything attached thereto.

Tenements are anything real in its nature which can be held.

Hereditaments are real property which is inheritable. They are *corporeal* that are *material* or substantial in their nature, and *incorporeal* that are intangible and consist of rights issuing out of real property.

Tenure consists of the conditions and terms and the rights and obligations arising out of the holding of the land.

359. QUESTIONS

What is real property? How is the subject subdivided? Define lands; tenements; hereditaments, both corporeal and incorporeal. Define tenure.

CHAPTER XLVI.

ESTATES

360. AN ESTATE—Elements and Characteristics .

361. FREEHOLDS

1. Inheritance—Fee Simple and Others
2. Non-Inheritance
 - (a) Dower
 - (b) Curtesy
 - (c) Homestead

362. INCIDENTS

363. NUMBER OF OWNERS

1. Estate in Severalty
2. Joint Estates
 - (a) Joint Tenancies
 - (b) Tenancies in Common
 - (c) Estates in Coparcenary
 - (d) Estates in Entirety
 - (e) Partnership Estates

364. TIME OF ENJOYMENT

365. RECAPITULATION

366. QUESTIONS

360. An Estate is the specific estate's degree of interest or right of property that one has in lands. It embraces three elements: (1) the right of possession, (2) the right of enjoyment, and (3) the right of disposition—subject to the right of the state to appropriate it to the public use. Estates possess the characteristics of (1) quantity or duration of interest, (2) quality of the interest, (3) time of enjoyment, and (4) number of owners. As to quantity or duration, estates are divided into freeholds—those

which endure for an uncertain period which, at least, may last during the life; and estates less than freeholds—which comprise the chattel interests in lands, such as leaseholds.

361. Freeholds. These are divided into estates of inheritance and those not of inheritance.

1. *Inheritance.* An estate of inheritance is one which, upon the death of the owner, either passes by descent to his heirs, or, under the provisions of his will, to his devisees. First in importance among estates of inheritance is the fee simple absolute, which is the highest estate known to the law. It is an inheritable freehold, free from condition and of indefinite duration. Other estates of inheritance are the determinable fees which are burdened with some clog, condition, or qualification that may operate to defeat or terminate the estate.

2. *Non-Inheritance.* Estates not of inheritance comprise all freeholds known as life estates. These may be created by agreement, or arise out of the marriage relation. The most important of those created by agreement is the estate for the owner's own life. Less important is the estate to be held for the life of another and the estate which may last for a life, as an estate during widowhood only. Of those arising from the marriage relation, the principal ones are dower, curtesy, and homestead.

(a) *Dower.* This is the estate which the law provides for the wife out of the real property of the husband. During his life it is but an inchoate right, but upon his death she becomes entitled to an estate for life in one-third of the lands of which he was possessed of an estate of inheritance during the marriage, and in which she has not released her dower right. While he is alive she can convey her right only by joining in a deed with him, or releasing to his grantee. After the husband's death and assignment of dower to the widow, she can convey the dower estate as freely as any other.

(b) *Curtesy.* This is a life estate created by operation of law for the husband in the lands of which the wife was possessed of an estate of inheritance during the marriage relation. This

estate becomes initiate upon the birth of issue born alive and capable of inheriting the estate, and takes effect in possession upon the death of the wife. In some of the states curtesy has been abolished by statute, and in its place the husband is given an estate similar to dower.

(c) *The Homestead*. This estate did not exist at common law; it is purely of statutory origin. The object of its creation is to provide for the family a home which shall be exempt from levy and sale under execution for the debts of the head of the family. The exemption rests upon public policy, and is not given from sympathy or charity. The estate is a life estate in its main features. It is generally provided that it shall be for the life of the householder, to the surviving husband or wife, and to the children during minority. The value of the property that may be claimed as a homestead is generally limited by the statute creating it. This varies in different states from \$1,000 to \$2,000 or thereabouts. The homestead estate may be lost or extinguished in two ways—by conveyance, and by abandonment with intention not to return. It is generally required that the conveyance, to be effective, must contain an express release of the homestead by both husband and wife and be acknowledged by both.

362. *Incidents*. A life tenant cannot claim compensation for permanent improvements made by him during his tenancy. He is presumed to have made them for his own benefit and convenience. He is bound to keep the premises in ordinary repair, and for this purpose he may cut a reasonable amount of timber for the repair of buildings and fences. He is also entitled to wood for fuel. The tenant, however, must not commit waste, which consists of any permanent and material injury or improper use of the property that impairs the rights of the owner of the fee. He may operate mines or pits already opened, but opening new ones constitutes waste. Upon his death, his administrator may claim emblements. (See Chap. XLVII—Landlord and Tenant.)

363. Number of Owners. As to number of owners, estates are classified as estates in severalty and joint estates.

1. *Estates in Severalty.* An estate in severalty is one of which there is but a single owner, who holds and enjoys it to the exclusion of all the world.

2. *Joint Estates.* A joint estate is one the title to which is vested in two or more persons.

Of joint estates there are five; viz., joint tenancies, tenancies in common, estates in coparcenary, estates by the entirety, and partnership estates.

(a) *Joint Tenancies.* A joint tenancy is a joint estate in which all of the co-tenants have one and the same interest, acquired at one and the same time, by one and the same instrument, held by one and the same possession. During their lives they equally enjoy the land or its equivalent in rents and profits. Upon the death of one, his share vests in the survivor or survivors, and so on until there is but one tenant, who then holds the estate in severalty; upon his death it descends to his heirs. This is known as the doctrine of survivorship. A joint tenancy cannot be acquired by descent; it can be created only by purchase, and may be in fee, for life or for years. Because of the peculiar doctrine of survivorship, American law is unfavorable to joint tenancies and favorable to tenancies in common, wherein the heirs of a deceased co-tenant take and not the surviving tenants. However, joint tenancies among trustees and other persons holding in a fiduciary capacity are still looked upon favorably. While a joint tenant's interest is not devisable or descendable, he may alienate his share to a stranger who will hold as a tenant in common with the other joint tenants that continue to hold in joint tenancy.

(b) *Tenancies in Common.* Joint estates in which there is unity of possession, but the titles may be separate and distinct and the interests different. If the estate is in fee, a tenant may dispose of his interest by will, or it will pass by inheritance to his heirs.

(c) *Estates in Coparcenary*. Tenancy in coparcenary was the joint estate which at common law vested by descent in the heirs of an intestate—one who had died without leaving a will. The estate is now obsolete, being superseded by tenancy in common.

(d) *Estates in Entirety*. Estate by the entirety arose at common law by conveyances to a man and wife jointly. They were not seized of the land by halves, but by entireties. The modern so-called “Married Women’s Acts” are generally held to have abolished these estates by inference, since the two are entirely inconsistent.

(e) *Partnership Estates*. An estate in partnership is a joint estate vested in the members of a partnership, purchased with partnership funds for partnership purposes. In equity the estate is treated as personal property liable for the partnership debts in preference to individual claims; but, in this country, after the payment of partnership debts, the remainder of the realty, or the proceeds of its sale, is treated as real property passing to the heir or devisee, and subject to the widow’s dower.

Partition is the act of dividing joint estates into estates in severalty among the co-tenants in proportion to their undivided shares in the joint estate. All joint estates are subject to partition except estates in entirety. The partition is voluntary when all the co-tenants join in mutual deeds conveying a separate parcel to each co-tenant in severalty. If all do not join, the partition is a nullity and those who have signed are not bound. Partition is compulsory or involuntary when enforced or compelled by suit at law or in equity by one or more of the co-tenants.

364. Time of Enjoyment. As to their time of enjoyment, estates are either present or future, or, as they are sometimes designated, *estates in possession* and *estates in expectancy*. A present estate, or an estate in possession, is any estate in lands, to the possession of which the true owner has or is immediately entitled. Future estates, or estates in expectancy, are such estates the possession and enjoyment of which is withheld or postponed

until some future time. The most common of these are reversions and remainders. A reversion is that future interest in lands which an owner has, after having conveyed a present estate to another person; as, for example, Smith, owning a fee, grants and conveys a life estate to Brown. The part of the fee left to Smith is a reversion. A remainder is a future estate in lands, which is preceded and supported by a particular estate in possession; and it takes effect in possession immediately upon the termination of the prior particular estate, and it is created at the same time and by the same instrument that creates the particular estate. By particular estate is meant a part or portion of the entire fee or interest; as, for example, a life estate is a particular estate. Suppose A has a fee simple estate in a quarter section of land and dies leaving a will whereby he devises to his wife a life estate in the land and the remainder in fee to his sons, John and James. The life estate of the widow is a freehold particular estate in possession and in severalty. The estate to the sons is a freehold of inheritance, and is a remainder in fee owned by them as tenants in common. Remainders are either vested or contingent. A remainder is vested when the title has already passed to the remainderman, as in the above example. It is contingent when the passing of title is withheld or suspended until the happening of some event which may or may not take place in the future, as the foregoing remainder to the sons would be contingent if it were given "to those of my sons who shall survive their mother." In such case it could not be known just which would survive their mother, and title would not pass until her death had rendered such fact ascertainable.

365. RECAPITULATION

An estate is the specific degree of interest or right of property in lands.

A freehold is an estate of indefinite duration.

A leasehold is an estate of definite or fixed duration.

An estate of inheritance is one which passes by descent to the heirs of the owner upon his death.

Dower is the estate which the law provides for the wife out of the real property of the husband.

Curtesy is the life estate created by law for the husband out of the inheritable estates of the wife.

Homestead is the estate which statutory law exempts from levy and sale under execution for the debts of the head of the family in order to preserve a home for the family.

An estate in severalty is owned by one person.

A joint estate is owned by two or more persons.

Partition is the proceeding whereby joint estates are apportioned into estates of severalty according to the interests of the joint owners.

A reversion is the future estate in lands which the owner has after having conveyed a present estate to another.

A remainder is a future estate in lands preceded and supported by a particular estate in possession, both the remainder and particular estate being created at the same time by the same instrument.

366. QUESTIONS

Define estate. What three elements does it embrace? What are the four chief characteristics estates possess?

Define a freehold; a leasehold. Classify freeholds.

What is an estate of inheritance? What are the principal estates arising out of the marriage relation?

Define dower. What is its extent or duration and out of what estates does it issue?

Define curtesy and enumerate the essentials necessary to its attaching.

Describe homestead and define its purpose. How may homestead be lost or extinguished?

Classify estates according to number of owners. Define an estate in severalty; a joint estate; a joint tenancy; a tenancy in common.

Distinguish between a joint tenancy and a tenancy in common.

What is an estate in partnership? Define partition, both voluntary and compulsory.

Distinguish between present estates and estates in expectancy.

Define a reversion; a remainder; a vested remainder; a contingent remainder. Give illustrations. What is a particular estate?

CHAPTER XLVII

LANDLORD AND TENANT

367. LEASEHOLDS—Tenancy for Years

1. Lease
2. Covenants
3. Waste
4. Lease Estate
5. Eviction
6. Remedies
7. Termination

368. TENANCY AT WILL

369. TENANCY FROM YEAR TO YEAR

370. TENANCY BY SUFFERANCE

371. EMBLEMENTS

372. FIXTURES

1. Actual
2. Constructive

373. RECAPITULATION

374. QUESTIONS

367. Leaseholds, or estates less than freeholds, as stated before, are regarded as personal property. Out of this interest arises the relation of landlord and tenant, which is a contract relation, the contract being known as a *lease*. The leaseholds comprise estates or tenancies for years, or at will, also from year to year, and by sufferance. An estate for years is an estate limited for a certain definite time, and may be created orally, or by an instrument in writing; but must be created by an instrument in writing if it is to endure beyond the minimum period fixed by the Statute of Frauds (usually one or three years) from the

date of the instrument. It does not become an estate until entry by the lessee; then from the lease and the entry arises the relation of landlord and tenant. An estate for years is also called a "term." While the estate endures the tenant alone can sue for injury to the possession, but the landlord may sue for injury to the reversion, which is that estate in the realty which he still owns after the termination of the estate for years. It is sometimes held that where a tenant holds over after the expiration of his term, such holding over constitutes a renewal of the original lease upon the same terms.

1. *Lease.* The lease should contain the names of the parties, a description from which the property can be readily identified, the date at which the term is to begin and its duration, the amount of rent reserved and the periods at which it is payable, and what is known as "operative words," which are words or phrases that express the intention of the lessor to convey the term or leasehold interest to the lessee. These are such words as "demise and lease." In addition a lease usually contains various stipulations called covenants, to be kept or performed by the lessor and lessee. A written lease should contain the full contract or relate to a written memorandum made a part thereof. It should be signed by both parties and dated. Ordinarily, leases are not recorded unless they are for long periods.

2. *Covenants* are agreements, fixing the rights and liabilities of the respective parties. Among these is the covenant by the lessee to pay rent, which is usually expressly stipulated to be paid in advance at certain payment periods, otherwise at common law where there is no agreement as to time of payment, rent is not payable until the end of the term. On the part of the lessor a covenant for the quiet enjoyment of the premises is said to be implied from the relation of landlord and tenant, also from the use of operative words, "demise and lease," or "grant and demise." The lessor also impliedly covenants for the payment of taxes. Other covenants are those to insure, to repair, to renew the lease. The lessor does not impliedly warrant the condition of the property nor its fitness for the uses for which it

A Lease,

Made and executed **Between** _____ Simon A. Eck _____
 of the _____ City _____ of _____ Burlington _____, Iowa, of the first part,
 and _____ Lester Johnson _____
 of the _____ City _____ of _____ Rock Island _____ Illinois, of the second part,
 this _____ first _____ day of _____ September _____ in the year one thousand
 nine hundred and _____ thirteen.

In Consideration of the rents and covenants hereinafter expressed, the
 said party of the first part **has Demised and Leased**, and does hereby demise and
 lease to the said *part y* of the second part _____
 the following premises, viz:

The second apartment, known as 2476 Catalpa Ct., in said City _____
 of Rock Island, _____
 with the privileges and appurtenances, for and during the term of — one year —
 _____ from the _____ first _____ day of _____ October _____ 1913
 which term will end _____ September 30, 1914 _____

And the said *part y* of the second part **covenant s** that he will pay to the party
 of the first part, for the use of said premises, the _____ monthly _____ rent of
 _____ fifty _____ Dollars (\$ 50.00), to be paid monthly in advance
 on the first day of each and every month during said term. _____

And Provided, said *part y* of the second part shall fail to pay said rent, or any
 part thereof, when it becomes due _____

_____ it is agreed that said party of the first
 part may sue for the same, or re-enter said premises, or resort to any legal remedy.

The *part y* of the _____ first _____ part **agree s** to pay all _____ taxes to
 be assessed on said premises during said term. _____

The *part y* of the second part **covenant s** that at the expiration of said term
 he _____ will surrender up said premises to the party of the first part in as good con-
 dition as now, necessary wear and damage by the elements excepted. _____

Witness the hands and seals of the said parties the day and year first above
 written.

Simon A. Eck

_____[L.S.]

Lester Johnson

_____[L.S.]

is rented; he must not, however, hide its known defects. The
 lessee should inspect the premises for himself. The lessee in the
 absence of an express agreement in the lease by the lessor to

make repairs, impliedly covenants to keep the premises in ordinary repairs, as it is sometimes said, "wind and water tight" and he must not commit waste.

3. *Waste* consists in any act of commission or omission, or any improper use, that results in permanent injury to the property. If the buildings are destroyed by fire, or otherwise rendered uninhabitable, the lessor is not bound to restore them unless he has so agreed in the lease, but the lessee may still be held to pay rent unless excused by the lease or by statute, and to rebuild the house if he has covenanted to re-deliver it in good order and condition. The lessee of farm lands must cultivate in accordance with good husbandry; he is entitled to estovers, which means the necessary and reasonable use of timber for fuel, repairs of buildings, fences and agricultural implements, if there is sufficient timber upon the land.

4. *Lease Estate*. An estate for years may be conveyed or assigned by the lessee if no covenant in the lease forbids it, so also the reversion may be conveyed by the lessor, with the result that the assignees or grantees shall enjoy the rights and be bound by the same liabilities as their respective assignors under the original lease. Where the tenant parts with his interest in the leased premises for the entire term, it is an assignment, and the lessor may look to either the lessee or his assignee for the rent. The lessee may sublet a part or the whole of the premises for a shorter term if not forbidden by the lease. The sublessee is not liable for rent to the original lessor, only to the original lessee. The law does not permit a tenant after he has accepted a lease and entered into possession to deny the validity of his landlord's title at the time the relation was created.

5. *Eviction*. An eviction of the tenant takes place when a third person successfully asserts a paramount title, or when he is deprived of full enjoyment of the property intentionally by the landlord. The tenant's remedies are suit upon the covenant for quiet enjoyment, which is thereby broken, and refusal to pay rent.

6. *Remedies*. Upon a lease for years the lessor has the right to sue for arrears in rent in an action of debt. This arises from

the privity of estate between the parties. If the lease is under seal and contains a covenant by the lessee to pay rent, the action of covenant will lie. This action is based upon the contract. If the instrument is not under seal, or there is merely a permissive occupation, and no stipulated rent agreed upon, the landlord may recover in an action of *assumpsit* a reasonable rent or compensation for the use and occupation of the premises. The landlord also has the remedy of distress, by which he may seize the tenant's chattels on the land and have the same sold by an officer of the law to satisfy his claim for rent. In some states the landlord has a lien for his rent upon all crops, which is enforceable by attachment or in equity. He may also re-enter for non-payment of rent, or bring an action in forcible entry and detainer and thereby regain the possession of the premises.

7. *Termination.* An estate for years may be terminated by expiration of the term or of the estate out of which it is created, by surrender to the owner of the reversion or merger in the reversion, by forfeiture for breach of a condition or for disclaimer of the landlord's title, by the happening of some event upon which its duration is contingent, and sometimes by the destruction of the premises.

368. Tenancy at Will. A tenancy at will is one which may be terminated at the will of either party. It is created by an agreement, express or implied, for an uncertain time, without any fixed rent. The tenant cannot assign his interest, and is liable for voluntary, but not for permissive waste. The tenancy is terminated by the act of either party inconsistent with its continuance, by the death of either party, or by the conveyance by either of his interest.

369. Tenancy From Year to Year. This tenancy is for one year certain, and for successive years, unless due notice be given to terminate it. It may be created expressly, or by a letting for an uncertain term, with payment of rent annually. The tenant's interest is assignable, and upon his death passes to his personal representatives. He is estopped to deny his land-

lord's title and is liable for waste. Notice to quit is required in order to terminate the tenancy, at common law at least six months before the end of the current year. The notice now is generally regulated by statute. Tenancies for less periods than a year created in the same manner, are similar in character.

370. Tenancy by Sufferance. This arises when one who has entered under a lawful lease continues in possession after his interest ceases, without the landlord's consent. This tenancy is unlike any of the others, and the tenant upon entry by the landlord may be treated as a trespasser. It may be terminated by the landlord in two ways, first, by recognition of the tenant, in which case a tenancy at will, from year to year, or for years arises, and, second, by entry, treating the tenant as a trespasser.

371. Emblements. These are those products of the soil which result from the annual labor and cultivation by the person in possession of the land, and are also known as "*fructus industriales*." They are generally regarded as chattels, and include the grains, garden produce, and other annual crops. Emblements are to be distinguished from "*fructus naturales*," such as trees, grasses, and perennial bushes, which are regarded as a part of the land and are therefore realty. The right of the tenant to emblements includes the right to enter after the termination of the tenancy to cultivate and harvest crops planted before such termination. Whether he has a right to these growing crops, depends upon the certainty or uncertainty of his estate or interest. The general rule is that if his interest is uncertain and is terminated without fault on his part, he will be entitled to emblements. Thus, tenants at will and from year to year, when the tenancy is terminated by the landlord, are so entitled. So, also, the personal representatives of life tenants are entitled to emblements; but, generally, a tenant for years may not have emblements, since his interest is certain and he can foresee whether the crop will mature during his term; tenants at sufferance may not have them, since their holding is wrongful, nor tenants whose tenancies are terminated by their own default.

372. A Fixture. This is a thing personal in its nature but which may become real property when annexed to, or used in connection with land, by some one having an interest therein. The annexation may be (1) *actual*, as in the case of buildings upon stone or brick foundations, or fences with posts in the soil, or it may be (2) *constructive* as in the case of keys and movable screen doors. Whether the chattel annexed is to be considered a part of the land, is determined by the manner of attachment and the nature of the chattel, as showing the presumed interest of the person annexing it. If the annexation is made in a permanent manner and by the owner of the property with the intention that it shall remain, the fixture becomes a part of the realty. If the annexation is of a temporary character and is made by one who has only a temporary interest in the realty, as a tenant under a lease, the presumption is that it was intended to be removed at the termination of such interest, and the fixture is treated as personalty. Ponderous machinery held in position only by its own weight may pass as a part of the realty. As between a mortgagor and mortgagee, or a vendor and purchaser of land, the common law and general rule is that the fixture passes to the latter in each case, as a part of the land, and is not removable. But in regard to fixtures which have been annexed by the tenant during his term the rule is different, and he is permitted to remove all fixtures annexed by him for trade, domestic or ornamental purposes, and generally agricultural fixtures. The present tendency is to allow him to remove anything which may come under one of these classes and which can be removed without permanent injury to the realty, such as stoves, looking glasses, machinery, or anything attached by screws. The common law rule favored the landowner; the modern rule relaxes in favor toward the tenant. Where the right of removal is in doubt, it is to be determined from the intention of the person annexing the chattel. Such intention is inferred from the nature of the article, the relation of the annexing party to the land, and the manner and purpose of the annexation. The proper time of removal is during the term, or before possession is surrendered, or when the

term is indefinite and is terminated without the tenant's fault, he has a reasonable time after termination in which to remove fixtures. An article which by attachment would become realty, may by agreement retain its chattel character. A fixture generally resumes its chattel character upon severance.

373. RECAPITULATION

Leaseholds are regarded as personal property. An estate for years is limited for a certain definite time, and may be created orally or by written instrument.

Covenants are written agreements fixing rights and liabilities.

Waste consists of any act of omission or commission which results in permanent injury to real property.

A tenancy at will is one that may be terminated at the will of either party.

Emblements are those products of the soil which result from the annual labor and cultivation by the person in possession.

A fixture is a chattel which, when attached to real property, either becomes realty or remains personalty, owing to the intention under which it was annexed.

374. QUESTIONS

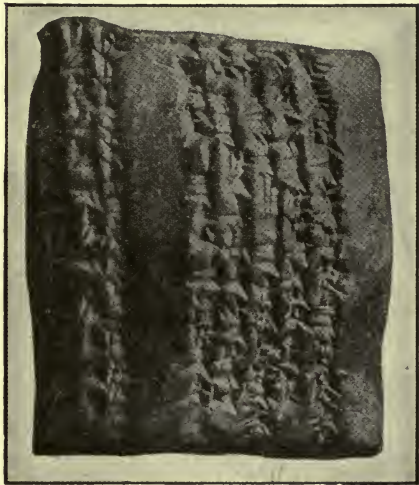
Classify leaseholds. Define an estate for years. When should a lease be in writing? From what does the relation of landlord and tenant arise? What is a term? What is a lease, and what should it contain? What are the operative words of a lease?

Enumerate covenants ordinarily contained in leases. Discuss and illustrate waste. Distinguish between assignment and a subletting. Define eviction. Enumerate and discuss the lessor's remedies.

How is an estate for years terminated? How is a tenancy at will created and terminated? Define a tenancy from year to year, and discuss the tenant's rights. Define tenancy by sufferance, and discuss the landlord's rights.

What crops are emblements and what are not? Discuss the tenant's rights to emblements. Distinguish and illustrate the difference between the actual and constructive annexation of fixtures.

AN ANCIENT MORTGAGE AND TRUST DEED



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"Thirty bushels of dates are due to Bel Nadin Shun, son of Marashu, by Bel Bullitsu and Sha Nabu Shu, sons of Kirebti, and their tenants. In the month of Tisri (month of harvest), of the 34th year of King Artaxerxes I.

they shall pay the dates, thirty bushels, according to the measure of Bel Nadin Shun, in the town of Bit Balatsu. Their field, cultivated and uncultivated, their fief estates, is held as a pledge for the dates, namely, thirty bushels, by Bel Nadin

Shun. Another creditor shall not have power over it."

The brick tablet pictured here was found some years ago in excavating the ancient Babylonian town of Nippur. This tablet among other cuneiforms was taken from the ruins of a banking house which evidently handled mortgages and loans of all kinds. The instrument is a first mortgage as well as a trust deed and note combined, and though executed in the fourth century before the Christian era (King Artaxerxes reigned 464-424 B. C.), exhibits many of the features of our modern documents.

CHAPTER XLVIII

MORTGAGES

375. INTRODUCTION

1. Form
2. Covenants
3. Absolute Conveyance
4. Recording Mortgages

376. JUNIOR MORTGAGES

377. RELEASE

378. ASSIGNMENT

379. FORECLOSURE

380. RECAPITULATION

381. QUESTIONS

375. Introduction. A considerable volume of business is being transacted at all times through the medium of real estate mortgages and trust deeds. A mortgage is a conveyance of land given as security for the payment of money or other obligation. Formerly, if the debt or obligation was not discharged on the due date, or date of performance, the title to the mortgaged property became absolute in the mortgagee. Consequently it often happened that the mortgagor entirely lost valuable property through not being able to pay promptly. Later the mortgagor was given the right to redeem the property by making payment in full of principal, interest, etc. to date. This right became known as the "equity of redemption," and is very beneficial to the mortgagor who, through misfortune or otherwise, is unable to pay promptly.

At the present time in many states a mortgage no longer conveys the legal title but merely operates as a lien upon the same to secure the payment of the debt or the performance of the obligation.

Any interest in land, whether held in fee, by right of dower, as an undivided interest, or under a contract of purchase, may be mortgaged. The debt secured by the mortgage is the primary or principal undertaking, while the mortgage itself is a secondary obligation and is said to be incident to the debt. The debt or principal obligation is usually, though not always, evidenced by a note or series of notes, or a bond. A trust deed is very similar in legal effect to a mortgage. The chief difference is that the title to the property is conveyed in trust to a third person as trustee, who holds the title both for the benefit of the owner of the property and those who are, or may become, the owners of the notes secured by the trust deed. An advantage in this is that when the ownership of the notes changes it is not necessary to assign the interest conveyed by the trust deed, as is necessary in the case of a mortgage. The owner of the notes, if he wishes, instead of foreclosing the mortgage, may sue the debtor upon the notes and obtain a personal judgment. This judgment becomes a lien upon all of the debtor's lands that are not exempt from execution.

1. *Form.* In form a mortgage is substantially a deed with a defeasance clause added. It is executed in the same manner and with the same formality. The defeasance clause contains the condition that upon the payment of the debt or the performance of the obligation the instrument shall be void. If it is the homestead that is mortgaged, the statute usually requires that to convey the same it is necessary to waive or release the homestead interest both in the body of the mortgage and in the acknowledgment of the same. The wife of the mortgagor should join in the execution of the instrument in order to release dower and homestead.

2. *Covenants.* Besides the conveyance of the land and the defeasance clause, the mortgage or trust deed usually contains

several covenants. First to be mentioned among these is the covenant providing that if there is default in the payment of any part of the principal or interest, or default in the performance of any covenant in the mortgage, the mortgagee shall have the option to declare the entire debt due; second, the covenant that requires the mortgagor to keep the buildings amply insured as additional security, provides also that if he fails to do this the mortgagee may insure at his expense and the same be added to the mortgage debt; third, the covenant which compels the mortgagor to pay promptly all taxes and assessments levied against the property, in default of which the mortgagee may pay the same and add the amount to the mortgage debt. Various other covenants relative to foreclosure are frequently included.

MORTGAGE—with Power to Appoint Receiver.

This Indenture Witnesseth, That the Mortgagor^s,

_____ William B. Smith and Millie J. Smith, his wife, _____
of the City of Chicago in the County of _____ Cook _____ and State of Illinois
Mortgage — and Warrant —, to _____ Morse Ives _____

_____ of the City of Chicago, County of _____ Cook _____ and
State of _____ Illinois _____ to secure the payment of _____ One _____
certain promissory note, _____ executed by _____ William B. Smith _____
bearing even date herewith, payable to the order _____ of Morse Ives, at the
Harris Trust and Savings Bank of Chicago, in the sum of five
thousand dollars, Jan. 2, 1915, together with interest at the
rate of 6% per annum, payable yearly, _____

the following described real estate, to wit: The South East quarter
(S.E. $\frac{1}{4}$) of the South West quarter (S.W. $\frac{1}{4}$) of Section twenty-
five (25) Township thirty North (30 N.) of Range thirteen (R.13)
West of the Third Principal Meridian, containing forty (40)
acres, more or less, _____

situated in the County of _____ Lake _____ in the State of Illinois, hereby
releasing and waiving all rights under and by virtue of the Homestead Exemption
Laws of the State of Illinois, and all right to retain possession of said premises
after any default in payment or breach of any of the covenants or agreements
herein contained.

But it is Expressly Provided and Agreed, That if default be made
in the payment of said _____ certain _____ promissory note, _____, or of any
part thereof, or the interest thereon, or any part thereof, at the time and in the

Trustee _____ of the _____ City of Chicago _____ County of _____ Cook _____ and State of _____ Illinois _____ the following described Real Estate, to wit:

Lots numbered Twenty-one (21) and Twenty-two (22) in Block numbered two in Garfield Park Addition, being a subdivision of the East half, of the South West quarter, of the South West quarter, of Section two (2), Town thirty-nine (39) North, Range thirteen (13) East of the Third Principal Meridian, excepting therefrom the following portion thereof: Beginning at a point two hundred eight (208) feet South of the North West corner of said East half, of the South West quarter, of the South West quarter, of said Section two (2); thence South along the West line of said East half, ten hundred eighty-two (1082) feet, more or less, to the North line of Chicago Avenue; thence East along the North line of Chicago Avenue two hundred ninety-nine (299) feet; thence North one hundred forty-one (141) feet; thence West one hundred twenty-five (125) feet; thence North nine hundred forty-one (941) feet, and thence West one hundred seventy-four (174) feet to the place of beginning, situated in the County of Cook, in the State of Illinois, _____

hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois, and all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements herein contained, in trust, nevertheless, for the following purposes:

Whereas, The said William B. Cromwell and Lottie Cromwell, _____ Grantor _____s_____, herein _____ are _____ justly indebted upon _____ three _____ Promissory Note _____s_____, bearing even date herewith, payable to the order of _____ Katherine McCann, said notes payable at the Fort Dearborn National Bank of Chicago, Ill., _____ as follows, to-wit:

One note for \$1500.00, due April 1, 1913, one year after date
One note for \$1500.00, due April 1, 1913, two years after date
One note for \$2000.00, due April 1, 1913, three years after date

Now, If default be made in the payment of the said _____ three _____ Promissory Note _____s_____, or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste, or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest, evidenced by the said _____ three _____ Promissory Note _____s_____, shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable; and, on the application of the legal holder of said Promissory Note _____s_____, or either of them, it shall be lawful for the said grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents; issues and profits thereof; and, in his own name or other-

wise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, their heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purposes herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and One Hundred Dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at seven per cent. per annum, then to pay the principal of said note s, whether due or payable by the terms thereof or the option of the legal holder thereof, and interest due on said note s up to the time of such sale, rendering the overplus, if any, unto the said party of the first part, their legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

When The said note s and all expenses accruing under this Trust Deed shall be fully paid, the said grantee or his successor or legal representatives shall re-convey all of said premises remaining unsold to the said grantor s or their heirs or assigns, upon receiving his reasonable charges therefor. In case of the death, resignation, removal from said Cook County, or other inability to act of said grantee to act then Edgar R. Hart of said County is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said grantee. It is agreed that said grantor s shall pay all costs and attorney's fees incurred or paid by said grantee or the holder or holders of said note s in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this Trust Deed, or a holder of said note s, and that the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

Witness, The hand s and seal s of the said grantor s, this first day of April A. D. 1913.

William B. Cromwell

Seal

Lottie Cromwell

Seal

3. *Absolute Conveyance.* It sometimes happens that a deed absolute on its face is given by a debtor to secure his debt. A court of equity always treats such a deed as a mortgage and permits the debtor to redeem the property from such conveyance within the period of limitation by repaying the creditor principal and interest in full. To this end the court freely admits oral evidence to establish the true intent of the transaction; viz., that the deed was given only as a security, and to contradict the intent as it appears from the face of the instrument.

4. *Recording Mortgages.* The law requires mortgages to be recorded just the same as deeds, in order to charge subsequent purchasers and mortgagees with notice. As between the parties to the instrument, the mortgage is valid without recording, unless otherwise provided by statute. Memorandum of the book and page number of the official record is made on the back of the instrument when it is entered in the recorder's archives.

MEMORANDUM OF RECORD

To

Davis Keeley

State of Ohio }
 County of Linn } ss.

No. 1642

This instrument was filed for record in the Recorder's Office of Linn County aforesaid, on the First day of March A. D. 1913 at 10:20 o'clock A. M., and recorded in Book 13 of Deeds on page 127

Abel Davis

RECORDER.

e, this *Twenty-seventh* day of *February*, 1913

Morris R. Daly

Notary Public

RELEASE OF MORTGAGE.

Know all Men by these Presents, That I, Morse Ives, of
the City of Chicago _____ of the County of _____ Cook _____ and
State of _____ Illinois _____ DO HEREBY CERTIFY, That a certain
Indenture of Mortgage, bearing date the _____ second _____ day of
_____ January _____ A.D. 1913, made and executed by William B. Smith
and Millie J. Smith, his wife _____
of the first part, to _____ Morse Ives _____
of the second part, and recorded in the Recorder's Office of _____ Cook _____
County, in the State of _____ Illinois _____ in Book _____ 10196 _____
of Mortgages, on page _____ 126 _____, on the _____ third _____
day of _____ January _____ A. D. 1913, _____
is, with the note _____ accompanying it, fully paid, satisfied, released and discharged.
Witness, _____ my _____ hand - and seal - , this _____ second _____
day of _____ January _____ A.D. 1915.

Morse Ives

Seal

Seal

State of Illinois }
_____ Cook _____ County. } ss.

I, _____ H. L. Klein, a
Notary Public _____

in and for the said County, in the State aforesaid, DO
HEREBY CERTIFY, That _____ Morse Ives _____
personally known to me to be the same person, _____ whose
name _____ is _____ subscribed to the foregoing Instrument,
appeared before me this day in person, and acknowledged
that _____ he _____ signed, sealed and delivered the said Instru-
ment as _____ his _____ free and voluntary act, for the uses and
purposes therein set forth.

GIVEN under my hand and _____ official _____ seal, this
_____ second _____ day of _____ January _____ A. D. 1915.



H. L. Klein

Notary Public.

376. Junior Mortgages. . Besides the first, the owner of the property may execute second and other subsequent mortgages, and all mortgages will take priorities according to their respective dates of execution where the various owners have notice of the existence of the other mortgages, otherwise they will take priority according to their respective dates of record. Upon foreclosure of the first, the surplus, if any, belongs to the second mortgagee, and if there is no surplus he gets nothing. If the second mortgagee forecloses first, he must do so subject to the rights of the prior mortgagee. Under the old English rule the owner of a first, or, say, third, mortgage might acquire these two interests and combine them into a first lien, thereby defeating an intermediate mortgage. This was called tacking mortgages together.

377. Release. Upon the payment of the debt or the performance of the mortgage obligation, the mortgage or the trust deed becomes void, and the mortgagor is entitled to a release of the mortgage or trust deed, as the case may be, in order that the same may be recorded and the title be discharged of the lien.

378. Assignment. If a mortgagee wishes to assign his interest under a mortgage, he must do so by an instrument in writing and under seal. If the debt is evidenced by notes, however, which are secured by a trust deed, the transfer of the notes is sufficient.

379. Foreclosure. If the debt is not paid when due, the mortgagee's remedy is to foreclose his lien. Foreclosure is a proceeding in equity whereby the creditor proves the amount of the debt including interest, solicitors' fees and all other charges provided for in the mortgage or trust deed, then the property is sold at judicial sale and thereby the equity of redemption is barred or cut off. If the property sells for more than the debt and all charges and costs, the remainder is turned over to the mortgagor or second mortgagee; if it sells for less, a deficiency decree or judgment may be entered up against the mortgagor for the remainder. All persons interested in the property must be made

parties to the foreclosure suit so that they can defend their interests if they wish, and that their rights may be cut off if they fail to defend or redeem. In several of the States a deed is not executed to the purchaser immediately following the sale, but a certificate of sale is issued to him and the mortgagor and others interested in the property are given a certain period in which to redeem from the sale by paying the amount for which the property was sold and interest to date. If redemption is not made within this period, the deed is then executed and the foreclosure is complete.

380. RECAPITULATION

A mortgage is a conveyance of land given as security for the payment of a debt.

Mortgages should be recorded the same as other conveyances.

Foreclosure is a proceeding in equity whereby the creditor proves the amount of his debt, the property is sold at judicial sale to satisfy the same and the mortgagor's equity of redemption is thereby cut off.

381. QUESTIONS

Discuss the rights of the mortgagor under the earlier common law and such rights at the present time. What is meant by "equity of redemption"? What may be mortgaged?

Distinguish between the primary obligation and the secondary obligation. Distinguish between mortgage and trust deed. In what form and manner should a mortgage be executed? What covenants are ordinarily found in mortgages?

How is absolute conveyance, given to secure a debt, treated in equity? What are the rights of junior mortgagees? How is the mortgagee's interest assigned? How is the property discharged of the lien? Enumerate and explain the various steps in foreclosure.

CHAPTER XLIX

TITLE

- 382. INTRODUCTION
- 383. REAL ESTATE CONTRACTS
- 384. DEEDS
 - 1. Elements of a Deed — (1) In Writing. (2) Sufficient Identity. (3) Consideration. (4) Words of Conveyance. (5) Description. (6) Executed. (7) Delivered and Accepted.
 - 2. Structure of a Deed — (1) Premises. (2) Habendum. (3) Tenendum. (4) Reddendum. (5) Conditions. (6) Covenants and Warranties.
 - (a) Description
 - (b) Recording
- 385. RECAPITULATION
- 386. QUESTIONS
- 387. DECISIONS BY THE COURTS
- 388. HYPOTHETICAL PROBLEMS
- 389. CONSTRUCTION WORK
- 390. SEARCH QUESTIONS

382. Introduction. Title consists of the means whereby an estate, right or interest in real property is held by the owner or is transferred by or from him to another person. According to the manner in which it is acquired title is divided into two classes, (1) title by descent and (2) title by purchase. Title by descent is the title with which an heir is invested by operation of law in the inheritable estates held by his ancestor at death. Title by purchase includes all other means of acquiring title than by

SHORT WILL.

In the Name of God, Amen.

I, _____ Wm. A. Harvey _____ of _____ Rock Island _____ in the County of _____ Rock Island _____ and State of _____ Illinois _____ being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare, this to be my last **Will and Testament**:

First, I order and direct that my Executor hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

Second, After the payment of such funeral expenses and debts, I give, devise and bequeath to my son, Henry J. Harvey, 20 U. S. Bonds of the denomination of \$1000.00 each.


Third, I give, devise and bequeath to my daughter, Helen I. Harvey, my apartment house and lot in the city of Rock Island known as "Lakeview."

Fourth, I give and bequeath to the Mary Thompson Hospital of Chicago, Ill., the sum of three thousand dollars.

Fifth, I give, devise and bequeath to my wife, Florence R. Harvey, all the rest, residue and remainder of my real and personal property. This in lieu of dower.

Lastly, I make, constitute and appoint _____ Henry B. Brown _____ of Moline, Illinois, _____ to be Executor of this, my last Will and Testament, hereby revoking all former Wills by me made.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, the _____fourteenth_____ day of _____March_____ in the year of our Lord one thousand nine hundred thirteen.

William A. Harvey 

This Instrument, was on the day of the date thereof signed, published and declared by the said testator _____ Wm. A. Harvey _____ to be his last Will and Testament, in the presence of us who at his request have subscribed our names thereto as witnesses, in his presence, and in the presence of each other.

Aaron E. Brown

James K. Spinner

descent. The title which an heir sometimes takes under a will executed by his ancestor is by some writers called descent title, but the better authority classifies this as purchase title.

383. Real Estate Contract. The most common method of acquiring purchase title is by a bargain and sale transaction. When the price of a lot or tract of land is agreed upon, it is customary for the purchaser and the owner to enter into a written contract for transfer of the land. A part payment is made to bind the bargain and the contract usually provides that the owner shall furnish the purchaser a complete merchantable abstract of title. This is submitted by the purchaser to his lawyer and, if upon examination by him the seller is found to have a good title, the transfer is completed by the payment of the rest of the purchase price and the delivery of a deed to the land. An abstract of title is a condensed history or synopsis of title as shown by the records of all instruments pertaining to the land, judgments or proceedings in courts of record, tax sales, assessments, etc.

384. Deeds. A deed is a written contract signed, sealed and delivered, whereby title to real property is conveyed.

1. *Elements of a Deed.* The essential features of a deed are that it must (1) be in writing, (2) give the names or sufficiently identify competent parties grantor and grantee, (3) recite the consideration, (4) contain words of conveyance, (5) describe the property conveyed, (6) be properly executed (that is, be signed, sealed and acknowledged), and (7) be delivered and accepted. It becomes effective upon the date of delivery, but must be accepted by grantee to be binding upon him.

The acknowledgment of a deed is a formal avowal on the part of the grantor, before a duly authorized officer, that he signs, seals, and delivers the instrument for the uses and purposes set forth in it. A certificate embodying the substance of this avowal in form as prescribed by law is indorsed upon or attached by the officer to the deed and his official seal affixed. Statutory law prescribes what officers may acknowledge deeds, but the most common is the notary public. The offices of the acknowledgment

are various. It may be necessary to a conveyance of a homestead, or to the validity of a married woman's deed, as a prerequisite to recording, or it may aid in making the deed or a certified copy of it admissible in evidence, owing to the requirements of the law of the various states or the stage of development of the law in a given state.

ACKNOWLEDGMENT

State of Illinois }
County of Cook } ss.



I, Wm. B. Henning, a Notary Public in and for said County, in the State aforesaid, **Do Hereby Certify**, that WILLIAM A. BERGMAN and ELLEN M. BERGMAN, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notarial Seal, this twenty-second day of May A.D., 1913.

Wm. B. Henning

Notary Public.

In addition to acknowledgment, some states require that a deed be attested by witnesses.

A delivery to a third person for the benefit of the grantee is called "delivery in escrow." This is done in order that the grantee may perform some condition before delivery becomes absolute, and the grantor can only recall the deed upon failure of the grantee to perform the condition. The seal was a common law requirement and is still necessary in most of the states, but has been dispensed with in some states. The impression in

wax was formerly in use as a seal, but a scroll inclosing the word "Seal" is now most generally used. Signing is an indispensable feature.

Words of conveyance are such words as show the intent on the part of the grantor to part with the title and transfer it to the grantee. They are such words as "give, grant, bargain and sell," or "convey and warrant," or "remise, release, convey and quit-claim." These words of conveyance very largely determine the character of the deed. The first two sets, above indicated, are found in warranty deeds, and the last set in quit-claim deeds.

Following the name of the grantee, the common law required the words "his heirs and assigns forever" to be inserted in the deed when it was intended to convey an estate of inheritance, but some states have changed this rule by statute so that a deed will be construed to convey a fee if a contrary intent does not appear.

2. *Structure of a Deed.* In point of structure, the chief component parts of a deed are: (1) the premises, which contains the names of the parties, any recitals in explanation of the deed, the consideration and the receipts of the same, the words of conveyance, the description of the property granted, and frequently the date; (2) the habendum, which contains the words "*to have and to hold*," and defines the quantity of interest which the grantee is to take in the property; (3) the tenendum which formerly defined the conditions of the tenure and is now practically obsolete and omitted from most deeds; (4) reddendum, which contains any reservation of rents, charges, easements, or rights of way that the grantor desires to retain in the property; (5) the conditions which embody the facts, and contingencies upon which the title is to vest or be forfeited in case the requirements of the condition as recited are not properly kept and complied with; (6) the covenants and warranties which are personal undertakings on the part of the grantor, usually five or six in number, as follows: That he is well seized of the property and has a good right to convey the same; that it is free and clear of all encumbrances, charges and liens; that the grantee

shall have the quiet enjoyment and peaceable possession of the premises; that if it is necessary to further perfect the grantee's title, the grantor will procure such further deeds as may be required; and, lastly, that he will forever warrant and defend for the grantee the title conveyed by the deed.

(a) *Description.* The property may be described by monuments, metes and bounds, or by maps, and by lot and block numbers.

(b) *Recording.* Provision is made in the statutes of all of the states for the recording, in some public office, of deeds of conveyance and other instruments effecting the title to real property. The record operates to give notice to all persons who may subsequently become interested in the property, and the instrument as recorded gives priority of right to the grantee. However, as to parties who have actual notice of the existence of an unrecorded deed, they are equally bound the same as if the instrument had been recorded, and it is only subsequent purchasers who buy in good faith without knowledge of the unrecorded instrument that are protected by the operation of the recording law.

As to their nature and effect, the two most common kinds of deeds in use are deeds of warranty and quit-claim. A warranty deed is one which, besides conveying the title to the land, contains certain personal covenants or warranties concerning the title. A quit-claim deed is one which merely conveys whatever interest the grantor has and nothing more. At the common law, as to form, deeds are of two kinds, deeds of indenture and deeds poll. Originally, deeds of indenture consisted of as many parts as there were parties to the instrument, and were signed by all the parties; while a deed poll consisted of a single instrument signed by the grantor. At the present time the distinction between deeds of indenture and deeds poll, at least in effect, is almost entirely lost sight of. The deed of indenture now consists of but one part and is signed, in most instances, only by the grantors.

WARRANTY DEED.

This Indenture Witnesseth, That the Grantor.....

_____ Austin N. Palmer and Sadie W. Palmer, his wife, _____
of the _____ City of New York _____ in the County of _____ New York _____
and State of _____ New York _____ for and in consideration of the sum of
_____ Seven thousand _____ Dollars, in hand paid,

Convey^s and Warrant^s to _____ James G. Skinner _____
of the _____ City of Chicago _____ County of _____ Cook _____ and
State of _____ Illinois _____ the following described Real Estate, to wit:
Lots numbered Twenty-one (21) and Twenty-two (22) in Block num-
ber Two, in the Re-subdivision of part of Waukegan Highlands in
Lake County, Illinois, being a subdivision of part of the North
half (N. $\frac{1}{2}$) of Section Thirty-three (33), Township Forty-five
(45) North, Range Twelve (12) East of the Third Principal
Meridian, according to plat thereof recorded August 6, 1904, as
document number 95931 in Book "F" of Plats, pages 70 and 71
situated in the _____ City _____ of _____ Waukegan _____ in the County
of _____ Lake _____ in the State of _____ Illinois _____ hereby
releasing and waiving all rights under and by virtue of the Homestead Exemption
Laws of this State of Illinois. !

Dated, This _____ seventh _____ day of _____ March _____ A. D. 1913.

Austin N. Palmer 

Sadie W. Palmer 

[Acknowledgment and Recorder's Certificate on back.]

QUIT-CLAIM DEED

This Indenture Witnesseth, that the Grantor

Earl F. Page, a bachelor, Francis Page and Mary A. Page, his
wife _____
of the _____ City of Waukegan _____ in the County of _____ Lake _____

and State of Illinois for the Consideration of Five Hundred Dollars

Convey_s and **Quit-Claims**_s to Fred W. C. Holtkamp of the City of New York County of Manhattan and State of New York all interest in the following described Real Estate, to-wit:

That part of the North East quarter, North of Indian Boundary Line, Commencing at a point in South line of the North East quarter of Section 22, Township 38 North, Range 15 East of the Third Principal Meridian, where a line parallel to and 80 feet South Easterly from the Easterly line of the right of way of Illinois Central Railroad intersects said South line of the North East quarter of said Section 22, thence North Easterly on a line parallel to the Easterly line of right of way of said Railroad 664.28 feet, thence East on a straight line 365.52 feet to a point 654.38 feet North of South line of North East quarter of said Section 22, thence south on a straight line 505.38 feet to a point in a line parallel to and 149 feet North of the South line of the North East quarter of said section and 540.87 feet East of the Easterly line of right of way of Illinois Central Railroad measured along last mentioned parallel line, thence West on said parallel line 363.35 feet, thence South 149 feet to a point in the South line of North East quarter of said Section 125 feet East of the point of beginning, thence West along the South line of the said North East quarter of Section 22, 125 feet to point of beginning, subject to the rights of the public in the South 33 feet thereof used as 115th Street; ALSO, reserving 8 feet of the East 363.35 feet thereof for public alley, containing 5.18 acres, more or less situated in the County of Lake in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State of Illinois.

Dated, this twenty-fourth day of March A. D. 1913

Earl F. Page

Seal.

Francis Page

Seal.

Mary A. Page

Seal.

385. RECAPITULATION

Title consists of the means whereby an estate is held or transferred by the owner.

Title by descent is the title with which an heir is invested by operation of the law in the inheritable estates held by his ancestor at death; title by purchase includes all other means of acquiring title.

An abstract of title is a condensed history or synopsis of title.

A deed is a written contract signed, sealed, and delivered, whereby title to real property is conveyed. Property may be described in a deed by monuments, metes and bounds, maps, or by lot and block numbers.

386. QUESTIONS

Classify title. Define title by descent, by purchase. Define abstract of title. Define a deed and enumerate its essential features. When does a deed become operative? What is delivery in escrow?

What are words of conveyance? Give examples. What is an acknowledgment? Distinguish between warranty and quit-claim deeds; between deeds of indenture, and deeds poll.

Enumerate the chief component parts of a deed. What do the premises contain? What is the office of the habendum; the reddendum? What are the principal covenants found in a warranty deed? What is the effect of recording?

387. DECISIONS BY THE COURTS

1. In *W v. W*, 170 Ill. 96, where the grantor executed a deed and placed it in a tin box in his kitchen and informed the intended grantee what he had done, but did not turn the deed over to him, and on the day before his death said to Luce, "he (the grantee) knows all about it, all he has to do is to put it on record," but the deed did not come into the possession of the grantee until after the death of the grantor, it was held that there was no delivery, since the deed never passed out of the control of the grantor during his lifetime either to the grantee himself or to Luce for his benefit.

2. In *S v. S*, 49 Cal. 59, where a conveyance to trustees, with power to sell and use the proceeds to pay expense and the debts of the grantor, was silent as to whether the trustees took as joint tenants or tenants in common, it was held that they took as joint tenants.

In *R v. M*, 48 Miss. 311, a joint tenancy can be created only by one and the same instrument.

In *L v. L*, 58 Ind. 526, where a husband and wife owned property as joint tenants, on the death of the husband it was held that the wife was entitled to the whole estate as survivor.

3. In *B v. H*, 3 Gill & J (Md.) 290, a unity of possession was held an essential attribute of a tenancy in common.

4. In *W v. McG*, 2 Barb. (N. Y.) 270, several persons who purchased land were held to be tenants in common and not partners.

5. Those profits which are the spontaneous products of the earth, or its permanent fruits, are real estate; but the corn and other growth of the earth, which are produced annually by labor and industry, called "fructus industriales," are for most purposes regarded as personal chattels. *M v. H*, 53 Kans. 398; *B v. O*, 36 N. J. Law 257; *B v. McK*, 23 N. C. 265.

6. In *H v. B*, 23 Ill. 320, it is held that real estate embraces such things as are permanent, fixed and immovable, and which cannot be carried out of their places, as lands and tenants, while personal property is defined to be goods, money and all other movables which may attend the person of the owner wherever he may go.

7. In *H v. N Co.*, 2 Colo. 273, it was held that a tenant has a right to remove trade fixtures, such as boilers and engines in a quartz mill, during the term of his tenancy.

8. Fixtures erected for agricultural uses are personalty, which the tenant may remove. *H v. S*, 26 Ala. 493; *P v. S*, 43 Miss. 349.

9. In *C v. G*, 15 Mass. 439, a lease for a term of years is held to be personal estate.

10. In *B Adm'r v. B*, 22 Ind. 122, estates for years are held to embrace such as for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as any definite number of years, however great.

11. In *F v. H*, 6 Ga. 423, a lease for a term of years is held to be not a freehold but a chattel.

12. In *N v. B*, 22 Ala. 382, it is held that lessees have the common-law right to assign their interest to a third person, to put him in possession and to clothe him with all their rights and privileges under the contract and that this right can only be restrained by express stipulation, and in *C v. T*, 31 Ala. 412, it is held that in absence of express stipulation to the contrary, a tenant has the right to sublet to another, in any manner not inconsistent with the terms of his own lease.

13. In *G v. S*, 8 Minn. 427, it was held that a tenant, if unrestrained by covenant, may assign his interest in or sublet the premises.

14. An agreement by a lessee not to let or underlet the demised premises, does not prevent him from assigning his entire interest under the lease. *F v. M*, 33 N. J. Law 254; *L v. H*, 27 N. Y. 415.

15. In *T v. V*, 24 Ill. App. 405, it was held that where one takes possession as a tenant and continues in use and occupation for five or six years, paying the same rent each year, the tenancy becomes one from year to year.

16. A tenant at will does not have an assignable interest in real estate, and an attempted assignment by him terminates the tenancy. *D v. D*, 10 Tenn. 248; *C v. H*, 55 Me. 33; *K v. L*, 98 Mass.

17. A tenancy at will is terminated at the will of either party. *K v. C Co.*, 47 Ind. 105; *D v. T*, 13 Me. 209.

18. In *R v. S*, 43 N. Y. 448, it was held that where a tenant at sufferance assigned his estate to another who entered upon the land, such person was a disseizor, and the landlord might have an action of trespass against him.

19. In *M v. H*, 51 Mich. 482, it was said that forfeiture clauses in leases are not favored by the courts, and their effect will be restricted as far as possible, but when the lease provides that the landlord may treat it as void on breach of conditions by the tenant, his election to do so dissolves the relation of landlord and tenant.

20. *B v. B*, 49 Ky. 227, assumpsit is maintainable, where there is no lease, by a simple promise to pay a given sum as rent for the premises.

21. *T v. M*, 21 Ark. 503, the action of debt was always maintainable for an agreed sum as rent, whether the demise was by deed, by an unsealed writing, or by word of mouth.

22. No particular form of words is necessary to constitute the relation of landlord and tenant. It is sufficient if there appears the intention on the part of one to dispossess himself of the premises and on the part of the other to enter under him for a definite period pursuant to agreement. *W v. M*, 57 Ky. 136; *M v. R*, 12 Me. 478.

23. In *E v. T*, 63 Mass. 407, it is held that an instrument, in form an indenture, executed by one party only, if it contains the requisite clauses to pass the property described, will operate as a deed poll.

24. To constitute a conveyance, there must be sufficient words showing an intention to grant an estate; *McK v. S*, 31 Mo. 541, and an instrument containing no words of grant is inoperative as a conveyance of the land described in it. *B v. M*, 21 N. H. 528.

25. Delivery is essential to the validity of a deed, but a deed purloined from the grantor, or obtained fraudulently or wrongfully, without his knowledge, consent or acquiescence, does not pass title. *Y v. G*, 70 U. S. 636; *H v. C*, 96 Ind. 412; *F v. B*, 30 Wis. 55.

26. A tenant for his own life, or for the life of another, is a freeholder. *R v. Van V*, 5 Denio (N. Y.) 414.

27. A tenant for life is only bound to make such repairs as shall be necessary to prevent waste. *K v. K*, 17 N. J. Eq. 504.

28. A lease contains of necessity an implied covenant for quiet enjoyment, and the word "lease," or "demise," imports a covenant for quiet enjoyment. *Owners v. W*, 18 Fed. 865; *S v. R*, 92 U. S. 107.

29. In *B v. L*, 33 Ill. 212, the court holds, at common law any act or omission which diminished the value of the estate or its income, or increased the burdens upon it, or impaired the evidence of title thereto, was considered waste.

30. In *W v. L*, 1 Del. Ch. 226, it has been held to be waste to till a farm contrary to the established rotation of crops, and contrary to the usage of that part of the country where it is situated.

31. In *McM v. R*, 9 Cal. 365, it has been held that a mortgage is a mere lien or security, and passes no title in the land, but only a chattel interest. The debt is the principal, the land the incident, and the equity may be sold and conveyed, subject to the lien. See also *D v. D*, 7 Ill. App. 136.

32. In *W v. W*, 68 Tenn. 250, it was held that all property, real or personal, corporeal or incorporeal, movable or immovable, may be the subject of mortgage.

33. In *R v. S*, 53 U. S. 139, it is held that a deed absolute on its face, but given merely as a security, will, in equity, be considered a mortgage. The same is held by the courts of practically every state in the country.

34. In *U v. B*, Fed. Case No. 16797, it was held that where a debt secured by a mortgage has been discharged by the mortgagor, the mortgagee is a trustee to make a reconveyance and a court of equity will enforce one.

35. As between mortgagor and mortgagee, anything pertaining to the real estate, necessary for its enjoyment, and permanently attached to the freehold, is a fixture for the benefit of the mortgagee. *McK v. M*, 3 Md. Ch. 186; *C v. B*, 11 N. J. Eq. 29.

36. As between vender and vendee, upon a sale of land, fixtures pass to the vendee. *Despatch Line v. B Mfg. Co.*, 12 N. D. 205; *P v. B*, 16 Vt. 124.

37. Permanent feuds, become fixtures and parts of the realty and pass with it. *C v. W*, 28 Mo. 556; *G v. B*, 43 N. H. 306.

38. The right of the tenant to recover trade fixtures must be exercised while in possession under his lease, unless, by some agreement with the landlord the right of removal is preserved. *F v. S*, 39 Nebr. 220; *T v. B*, 38 N. J. Law 457.

39. The general rule of law that, between vender and vendee, fixtures pass with the realty, has been considerably relaxed in favor of tenants; and fixtures, intended by the tenant for the purpose and enjoyment of his tenancy during the term, are his personal property, removable before the end of the term. *C v. J*, 3 B. (Md.) 284; *T v. B*, 48 Miss. 1.

40. An eviction of a tenant is an interference with his possession of the premises, or some part thereof, by or with the consent of the landlord, by which the tenant is deprived of the use without his assent. *O v. S*, 3 E. D. Smith (N. Y.) 166.

388. HYPOTHETICAL PROBLEMS

1. A, having held a farm for three years, has put up a shed for sheep. It consists of a roof supported by posts driven into the ground. A's tenancy is about to expire and he proceeds to remove the shed. It can be removed in sections and set up elsewhere. The landlord forbids the removal. Discuss rights of parties.

2. W, the owner of an estate for his own life, two years ago leased the land in which he owned the life estate to G for a term of ten years. W has just died. What are G's rights to the crops now growing on the land? Has G the right under the lease from W to continue in possession any longer? To whom are rents due from G?

3. M has just died, the owner in fee of eighty acres of land, and the owner of a term of years in another parcel of land. The lessor's name is N. Who succeeds to the legal title of the fee? Who takes the legal title to the term of years? Is either of these interests a freehold? If so, which.

4. A sued B for rent. B pleaded that at the time the lease was executed by A to him, under which he entered into the possession of the premises, A had no title to, or interest in, the premises, and that said lease conveyed to defendant no interest in said premises. Is this a good defense? Why?

5. The tenant of a store found, on taking possession, that several panes of glass were broken, and he put in new glass at his own expense. He also took out the sash in the front of the store and put in large sheets of expensive plate glass. Just before the end of his term he commenced to take out the panes of glass, and also to take out the plate glass, intending to restore the former sash. The landlord seeks to restrain him by injunction. Can he do so?

6. Lease of land to A for the life of B. A dies, B living. Who is entitled to land after A's death and during life of B at common law? If the lease had been to A and his heirs, would the result have been different?

7. An estate is devised to A and his heirs, but if he dies without issue living at his death, then to B and his heirs. A, being unmarried, has allowed the mansion house to fall out of repair, has cut down half of the ornamental trees about the house and sold them for \$1,600, and is preparing to cut down the others. What remedies, if any, has B against A?

8. One, Carney, deeded lands to Masters for life. Masters sold the land to Oakes and gave him possession. About a quarter of the land is timber. Oakes has started in to cut the timber and has announced his intention to clear the land. Some of the logs are in a mill yard, some are already sawed, and some of the timber has been sold. Some of the logs are still on the land and only about half the timber has been cut as yet. Who is the party injured? Should he come to you for advice what steps would you advise him to take in order fully to recover his rights, leaving no opportunity for advantage to the wrong-doer? Reasons in full.

9. A mortgaged land to B; afterwards A conveyed the land to C who had knowledge of the mortgage. C recorded his deed; afterwards B recorded his mortgage and subsequently C sold and conveyed the land to D, who recorded the deed to him. Is B's mortgage good against D?

10. A has a mortgage for \$1,000 on land, which is prior in right to a mortgage for \$2,000 held by B on the same land. C has a mortgage for \$2,000, on the land which is prior to that of A in right, but is junior to that of B. The land is sold in a foreclosure suit, and the proceeds of sale, amounting to \$3,000, are brought into court for distribution. How should the liens be marshaled?

11. There are three mortgages on A's house, given at three different times. B is the first mortgagee, C the second, and D

the third. D assigns his mortgage to B. (a) Compare B's rights with C's. (b) Compare the English rule with the American. (c) Give a reason for each rule. (d) What is meant by "the tacking of mortgages?"

12. A holds a mortgage on B's farm for \$1,000. Before the mortgage matures B, without A's knowledge, sells the farm to C, who assumes the mortgage. At maturity the mortgage debt is not paid. (a) What remedy, if any, has A against C in equity? (b) What remedy, if any, has A against B?

13. A lot upon which a mortgage exists is sold to different parties in several different parcels. How will the mortgage be enforced?

14. A mortgages to B on January 1, 1900, for \$10,000, B paying \$3,000 and agreeing to pay \$1,000 more on the first of each month. Mortgage was recorded the same day. On February 1, 1900, B pays \$1,000 more. On February 15, 1900, C obtains a judgment against A for \$1,500. On March 1, 1900, B advances \$1,000 more. On March 15, 1900, A makes a second mortgage on the property to D, who notifies B. B asks you to advise him as to his position.

15. A mortgaged to B for \$5,000. M owed A \$1,000 on a book account. B assigned the mortgage to C, who notified A. While C owned it he became indebted to A on a book account for \$2,000. C assigned the mortgage to D, who began to foreclose. Advise A whether he can defend.

389. CONSTRUCTION WORK

In the following you are Mr. Jos. W. Mattes, attorney, and you are instructed to draw these papers:

1. Draw a land contract for the following: Grantor, Edward T. Taylor and Jean W. Taylor, his wife; grantee, John Graynor; consideration, five thousand dollars; one thousand dollars on the signing of this instrument, one thousand dollars when a warranty deed is delivered, and the balance three years after date; interest at six per cent, per annum, payable semi-annually, secured by mortgage; that tract or parcel of land,

city of Chicago, county of Cook, State of Illinois, lots No. 20 and 21 Gordon Strong & Co. Subdivision, said lots north of Logan Boulevard and west of California Avenue, a front of 30 feet to each lot and a depth of 175 feet.

Waive homestead rights, and party of the second part to pay all taxes levied and to be levied.

A minimum building limitation of \$2,500, front of building not to be within 20 feet of sidewalk line.

2. Draw the warranty deed for the above.

3. Draw the principal note and six coupon notes.

4. Draw the mortgage for the above.

5. It is found that William W. Taylor as heir at law has a partial claim to the above described real estate, but will release his interest for one hundred dollars. Make out a proper quit-claim deed.

Write a letter to Mr. Edward T. Taylor explaining the situation and make a request for remittance to cover the expenses.

6. Draw a release deed for the cancellation of the mortgage.

7. Have all the above papers that require it acknowledged before you as a notary public.

390. SEARCH QUESTIONS

As a general rule how is land described in deeds?

Are there any restrictions placed upon aliens regarding ownership of real estate?

May an alien inherit real estate? If not what is done with the property?

Are there any rules relating to the escheating to the state? What are they?

Is the title to roads in the landowner or in the municipality?

Are right to rivers and inland lakes in the individual or in the public?

Are hunters allowed to cross fields in quest of game?

What are the dower rights of the state? Rights of Curtesy?

May a wife hold and alienate real estate the same as a man may?

Is there a homestead exemption law and what is the amount?

POWER OF ATTORNEY

Know All Men by these Presents, That

We, Joseph E. Sheffield and Maria, his wife, _____
of the _____ City _____ of _____ New Haven _____ County of _____ New Haven _____ in the
State of _____ Connecticut, _____ have made, constituted and appointed, and BY
THESE PRESENTS do _____ make, constitute and appoint William B. Ogden,
Mahlon D. Ogden, Edwin H. Sheldon and Edwin R. LaBarr, _____
of the _____ City _____ of _____ Waukegan _____ County of _____ Cook _____
and State of _____ Illinois _____ true and lawful Attorney.s for _____ themselves _____
and in _____ their _____ name.s, _____, place and stead, to take upon themselves
the charge, care and management of the lands hereinafter men-
tioned, that is to say, the whole of Section 32, the South East
quarter of Section 31, the South half of the North East quarter
of Section 31, the South half of the North East quarter of Sec-
tion 31, the South West 29 and the West half of the South West
quarter of Section 33, all in T. 40 N., R. 14, E. of 3rd P. M.,
in Cook County, Illinois; and to lease, sell and dispose of, or
contract for the leasing, sale and disposition of said lands, or
any portion thereof, for such consideration and upon such terms
of payment as they or either of them may deem sufficient; to
make, execute, acknowledge and deliver all proper and necessary
papers, deeds and conveyances, in the law that may be required;
to grant, bargain, sell, and convey with covenants of warranty,
all constituents' right, title and interest, dower and right of
dower, of, in and to the lands before mentioned.

Also to ask, demand, sue for, recover and receive all
monies that may become due from any person or persons, from or
on account of said lands, or any portion thereof, and to make
and deliver good and valid receipts, acquittances and discharges
therefor, _____

giving and granting unto _____ their _____ said Attorney.s full power and
authority to do and perform all and every act and thing whatsoever, requisite and
necessary to be done in and about the premises, as fully, to all intents and pur-
poses, as _____ they _____ might or could do if personally present at the doing
thereof, with full power of substitution and revocation, hereby ratifying and con-

firming all that _____ their _____ said Attorney s. or _____ their _____ substitute shall lawfully do or cause to be done by virtue hereof.

In Testimony Whereof, _____ we _____ have hereunto set _____ our _____ hand s. and seal s. this _____ Fourth _____ day of _____ May _____ 19 13.

Signed, Sealed, and Delivered in Presence of

Ivan Gustafson

Leon A. Smith

Joseph E. Sheffield Seal.

Maria Sheffield Seal.

Seal.

Seal.

State of _____ Connecticut }
County of _____ New Haven } ss.

I, _____ H. L. Daniells, _____

a Notary Public

in and for, and residing in the said County, in the State aforesaid, DO HEREBY CERTIFY, that _____
_____ Joseph Sheffield and Maria Sheffield _____
personally known to me to be the same person s. whose name s. subscribed to the foregoing Instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said Instrument as their free and voluntary act, for the uses and purposes therein set forth.

SEAL

Given under my hand and _____ Notarial _____ seal, the _____ Fifth _____ day of _____ May _____, A. D. 1913.

H. L. Daniells

CHAPTER L.

GLOSSARY

(Principal authority, Anderson's Law Dictionary published by T. H. Flood & Co., Chicago, Ill.)

- Abrogate.** To revoke or annul one written law by another.
- Abstract of Title.** A concise statement of the record evidence of one's title or interest in realty. Frequently spoken of as an "abstract."
- Acceptance.** A receiving—with approval, or conformably to the purpose—of a tender or offer; receiving with intention to retain.
- Acceptance Supra Protest.** The acceptance of a bill, after it has been dishonored, for the honor of the drawer or an indorser.
- Acceptor.** One who accepts a bill of exchange—usually the drawee.
- Accommodation Indorser.** One who, not a regular party to a paper, adds his name to its credit.
- Accommodation Paper.** A loan of the maker's credit (without restriction as to the manner of its use) by means of a bill of exchange or a promissory note, and by making, accepting, or indorsing the same, as the case may be.
- Accord and Satisfaction.** A satisfaction agreed upon between the party injuring and the party injured, and the payment of same.
- Act of God.** Such inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning or tempest, floods or inundation.
- Action.** Doing a thing, the exercise of power, physical or legal; the thing itself as done; an act, as, legislative, judicial, executive action.
- Adjudication.** Determination by judicial authority.
- Administrator.** One appointed by a competent court to settle the affairs of a decedent's estate.
- Admiralty.** A court exercising jurisdiction over controversies arising out of the navigation of public waters; also, the system of jurisprudence which pertains to such controversies.
- Adult.** A person twenty-one or more years of age; in the case of females, in some states, eighteen years of age.

Adverse Possession. A term applied to the holding of real estate adversely to another.

Affidavit. A voluntary oath, before a judge or an officer authorized to administer oaths, to evince the truth of certain facts; as, the facts upon which a motion is grounded.

Agency. The relation between two persons as principal and agent.

Agent. A person employed by another to act for him. Opposed, principal.

Agister. One who takes the cattle of another into his own ground to be fed for a consideration to be paid by the owner.

Alias. Otherwise; also used in the sense of "for."

Alien. A foreigner; one born in or belonging to another country, who has neither acquired citizenship nor is entitled to the privileges of a citizen.

Alien Enemy. One who owes allegiance to a state at war with the state in which he then lives.

Alienate. To transfer or convey title, property or other right to another.

Alimony. An allowance which a husband or former husband may be forced to pay his wife or former wife.

Aliunde. From another place, as outside evidence—evidence aliunde.

Allonge. A paper attached to a bill or note for such indorsements as the original paper itself will not hold.

Alteration. A change or substitution of one thing for another; as, the alteration of a way.

Ambiguity. Doubtfulness and uncertainty in regard to meaning.

Annuity. A yearly sum stipulated to be paid to another in fee or for life or years, and chargeable only on the person of the grantor.

Annulment. The act of making void.

Anomalous Indorsement. An irregular indorsement.

Ante. Before; hereinbefore.

Antedated. Dating back or at an earlier time than the date of making.

Appraise. To set a price upon by authority of law.

Appurtenance. A right connected with the enjoyment or use of another thing as principal; also, the thing itself out of which the right grows as an incident.

Arbitration. The hearing and determining of a cause between parties in controversy by a person or persons chosen or agreed to by the parties.

Articles of Co-partnership. The written agreement by which a partnership is formed.

Assent. Agreement; approval; compliance; consent; willingness declared. Opposed, dissent.

Assets. Property sufficient to answer a demand made by a creditor or a legatee upon an executor or administrator, or by a creditor upon an insolvent or a bankrupt.

Assign. To transfer or make over to another the right one has in any object.

Assignee. One to whom property is transferred; more particularly one to whom an insolvent or a bankrupt makes over his whole estate for the benefit of his creditors.

Assignment. A transfer of property to another for himself or creditors; also, the writing containing the evidence thereof.

Assignor. One who transfers property to another person.

Attachment. The seizure of property by direction of court.

Attestation. Signing as a witness. To witness an instrument.

Attorney in Fact. One who serves another as agent in the doing of a particular thing; an agent for the transaction of an act specified in a sealed instrument called a "letter" or "power" of attorney.

Award. To allow by judicial determination; as, for a court to award a writ of habeas corpus or other process.

Bailee. One who receives a thing bailed.

Bailment. A delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee.

Bailor. One who delivers a thing to another in bailment.

Banknote. A promissory note, issued by a bank under authority of law, payable on demand to the bearer.

Bankruptcy. The status or condition of being a bankrupt; also, that branch of the law under which the assets of the estate of a bankrupt may be distributed among his creditors and the bankrupt discharged from the indebtedness.

Barter. A contract by which goods are exchanged for goods.

Beneficiary. One who is entitled to the benefit of a contract or of an estate held by another.

Bequeath. To give personal property by will.

Bequest. A gift of personalty by will; the clause in the instrument making the gift; the thing itself so given.

Bilateral. Designates a contract executory on both sides; as, a sale, opposed to unilateral.

Bill of Exchange. A written order directing a second party to pay to a third party a certain sum of money. Commonly known as a draft.

Bill of Lading. A document delivered by a carrier to one sending goods by him, acknowledging that they have been received by him for transportation to a certain place. It is both a receipt and a contract.

Bill of Sale. An agreement in writing by which one person sells to another his interests in personal property.

Blank Indorsement. Unrestricted; indorsee not named; as, an indorsement in blank.

Bona Fide. In good faith. Open and without fraud or deceit.

Bond. That which binds; any instrument in writing that legally binds a party to pay a sum of money or to do a certain thing. "Bond," "obligation," and "instrument in writing" are sometimes used interchangeably.

Boycott-ing. A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who, by non-compliance with the demand, has rendered himself obnoxious to the immediate parties, and, perhaps, to their personal and fraternal associates.

Breach. Relating to the violation of a law, contract, or other obligation.

Cargo. Goods on board of a vessel.

Capital Stock. The sum upon which calls may be made upon the holders of the stock of a corporation, and upon which dividends are declared.

Caveat Emptor. "Let the buyer beware."

Caveat Venditor. "Let the seller take heed."

Certificate of Deposit. A special form of depositing money with a bank, a receipt being given that may be negotiated.

Certificate of Stock. A written receipt issued by the officers of a corporation in favor of a designated person, acknowledging his ownership of a certain number of shares of stock.

Certified Check. A check marked "good" by the banker.

Cestui Que Trust. One for whom a trust exists, or was created; the beneficiary under a trust.

Charter Party. A contract by which the owner lets his vessel to another for freight.

Chattel. Things personal include not only things movable, but something more; the whole of which is comprehended under the general name of "chattels," which Coke says is a French word signifying goods—from the technical Latin "catalla," which meant, primarily, beasts of husbandry, and, secondarily, all movables in general. In Normandy, a chattel stood opposed to a fief or feud.

Chattel Real. Chattels real, says Coke, are such as concern, or savor of, the realty; as, terms for years of land, estates by a statute-merchant, statute-staple, or the like.

Chose. A thing recoverable by an action at law; a thing, personally.

Civil Action. A suit in which there may be a recovery for a private right or compensation for deprivation thereof.

Civil Law. The law of citizens; the law which the people of a state ordain for their own government.

Code. A reduction and revision of the law and procedure of a political community, upon one or more general subjects, and the enactment of this new, systematized statement as one statute.

Collateral Securities. A security side by side with, or in addition to, other security as the primary or principal obligation, or additional to the debtor's own engagement.

Commercial Paper. Negotiable, such as bills of exchange, promissory notes, bank checks, given in the due course of business.

Common Carrier. One who undertakes, for hire or reward, to transport from place to place the goods of such as choose to employ him.

Common Law. The law common to all the realm. A collection of maxims and customs of higher antiquity than memory or history can reach.

Complaint. A formal charge that a person named has committed an offense, preferred before a magistrate or a tribunal authorized to inquire into the probable truth of the accusation.

Composition. In the law of copyright, the invention or combination of the parts of a work—literary, musical, or dramatic; as, in the case of a letter, discourse, or book; or of an opera; but not of a mere exhibition, spectacle, or scene.

Compromise. A settlement of differences by mutual concessions.

Condition Precedent. Such condition as must happen or be performed before an estate can vest or be enlarged.

Condition Subsequent. A condition upon the failure or non-performance of which an estate already vested may be defeated.

Consanguinity. The connection or relation of persons descended from the same stock or common ancestor; blood-relationship.

Consignee. The factor or agent to whom merchandise or other personal property is shipped.

Consignor. One who makes a consignment of personal property.

- Conversion.** An unauthorized assumption and exercise of ownership over personal property belonging to another.
- Conveyance.** The act of transferring from one person to another; as by "lease and release."
- Co-Owners.** Joint owners.
- Co-partnership.** A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits and losses thereof between them.
- Co-Proprietors.** Joint proprietors.
- Copyright.** An exclusive right to the multiplication of the copies of a production.
- Corporation.** An artificial person; a group of persons united by law and having a continuous existence irrespective of that of its members, and powers and liabilities different from those of its members.
- Costs.** The expenses of an action recoverable from the losing party.
- Counter-Claim.** A cross-demand, existing in favor of a defendant. Includes recoupment and set-off.
- Court of Equity.** A court which proceeds wholly according to the principles of equity, *q. v.*
- Court of Law.** Any court which administers justice according to the principles and forms of the common law.
- Covenant.** A promise under seal; as, a covenant to pay rent.
- Coverture.** The status of a married woman considered as under the power of her husband.
- Crime.** An act committed or omitted in violation of a public law either forbidding or commanding it.
- Curtesy.** The life estate a husband enjoys to property of his deceased wife, provided children have been born able to inherit.
- Custom.** The fixed habits of a community that are and have been for a long time past generally recognized in it as the standards of what is just and right.
- Damages.** The compensation which the law will award for an injury done.
- Days of Grace.** Three additional days after maturity in which to pay a negotiable bill or note.
- Deceit.** Any device or false representation by which one man misleads another to his injury.
- Decree.** The decision, judgment, or sentence of a court of equity, of admiralty, of probate, or of divorce jurisdiction.
- De Facto.** In fact; as, a government *de facto*.
- Default.** A failure to perform a required act in a lawsuit within a required time.

Defendant. One who is called upon in a court to make satisfaction for an injury done or complained of.

Del Credere. Of trust, credit. Applied to an agent or factor who guarantees that the persons to whom he sells will perform the contracts he makes with them.

Delivery. The placing of one person in legal possession of a thing by another.

Demand. The right to claim anything from another by contract, tort, or superior right of property; asking or seeking for what is due or claimed as due.

Demise. A lease for years; it creates an implied warranty of title and a covenant for quiet enjoyment.

Deponent. One who, being under oath, testifies in writing.

Deposit. To give in charge to another person, to commit to custody and care of another; to leave with for safe-keeping; to deliver to for further action, for a special or a general purpose, explained or understood.

Descent. The passing of real property to the heir or heirs of one who dies without disposing of it by will.

Deviation. In marine insurance, a voluntary departure, without necessity or reasonable cause, from the usual course of the voyage.

Devise. Originally, to divide or distribute property; now, to give realty by will.

Disability. Incapacity for action under the law; incapacity to do a legal act.

Discount. A counting off; an allowance or deduction from a gross sum on any account.

Dishonor. To refuse or neglect to accept or to pay negotiable paper at its maturity; also, the failure itself.

Doctrine. The principle involved, applied, or propounded; as the doctrine of escheat, estoppel, relation.

Domicile. The place where a person lives or has his home; that is, where one has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.

Dower. The interest which the law gives a widow in the realty of her deceased husband.

Draft. A written order drawn by one person upon another; a bill of exchange.

Duress. In its more extended sense, that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.

Earnest. A part of the price of goods or service paid to a vendor at the time of bargaining, in assurance of a serious purpose to complete the contract.

Easement. A service or convenience which one neighbor has in another's land by charter or prescription, without profit.

Embezzlement. Appropriation to one's own use of anything belonging to another, whether rightfully or wrongfully in the possession of the taker; theft.

Emblements. The vegetable chatels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously, but by labor and industry.

Eminent Domain. The power to take private property for public uses is termed "the right of eminent domain."

Enact. To establish in the form of positive law, or by written law.

Equity. The point of contrast between the law of nations and the law of nature was "equity," a term which some derive from a Greek word denoting the principle of equal distribution; but that origin is to be preferred which gives the term the sense of "leveling." The civil law of Rome recognized many arbitrary distinctions between classes of men and property. The neglect of these distinc-

tions was that feature of the law of nature which is depicted in equity. It was first applied, without ethical meaning, to foreign litigants.

Escheat. In the United States, a reversion of property to the state in default of a person who can inherit it.

Escrow. An instrument delivered to a third person to hold till some condition is performed by the proposed grantee. A scroll or writing not to take effect as a "deed" till the condition is performed.

Estate. Interest in real or personal property. More specifically, an interest in or concerning land.

Estoppel. The stopping of a person by a rule of law from asserting a fact or claim.

Eviction. It is difficult to define this word with technical accuracy. Latterly, it has denoted what formerly it was not intended to express. In the language of pleading, a party evicted was said to be expelled, amoved, put out. The word, which is from evincere, to dispossess by a judicial course, formerly denoted expulsion by the assertion of a paramount title, and by process of law. It is now popularly applied to every class of expulsion or amotion.

Executed Contract. A completed contract.

Execution. Doing or performing a thing required.

Executor. The one to whom another commits by will the execution of his last will and testament.

Executory Contract. A contract that is to be carried out in the future.

Export. To send merchandise from one country to another.

Extradition. Surrender, by one government to another, of a person who has fled to the territory of the former to escape arrest and punishment under the criminal laws of the latter.

Factor. An agent who is commissioned by a merchant or other person to sell goods for him and receive the proceeds.

Fee. In feudal law, an allotment of land in consideration of military service; land held of a superior, on condition of rendering him service, the ultimate title remaining in him. Also called a fief or feud.

Fee-Simple. An absolute inheritance, clear of any condition, limitation or restriction to particular heirs, but descendable to the heirs generally, whether male or female, lineal or collateral.

Feud. A fief or fee.

Fief. See Fee.

Firm. An association for the purpose of prosecuting any lawful business, formed by contract between two or more persons.

Foreclosure. The act of selling at public sale a mortgaged property upon which the mortgage has expired and the debt secured by it has not been paid.

Forgery. At common law, the fraudulent making or alteration of a writing to the prejudice of another man's right.

Franchise. A royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject; it is now obtained by a grant from the state. In general, a right or privilege.

Fraud. Craft, cunning, deceit contrary to equity and good conscience.

Freight. Merchandise transported or to be transported; also, compensation for such service.

Fructus Naturales. Nature's growths; natural fruits; increase by the unassisted powers of nature; as, the fruits of uncultivated trees, the young of animals, and wood.

Good Consideration. That of blood, of natural affection between near relatives.

Good Will. The degree of favor enjoyed by a business concern as indicated by its public patronage.

Goods. Has a very extensive meaning. In penal statutes it is limited to movables which have intrinsic values, and does not include securities, which merely represent value. In wills, when there is nothing to restrain its operation, it includes all the personal estate.

Guarantor. One who makes a guaranty.

Guaranty. Solemn assurance, covenant, or stipulation that something shall be or not be done; as, the guaranties in the Constitution and Amendments thereto.

Guardian. One to whom the law entrusts the care of the person or property of another.

Heir. At common law, the person upon whom the law casts the estate immediately on the death of the ancestor.

Idiot. One who has been without understanding or reasoning power from birth.

Inchoate. Commenced, but not completed; not fully in existence or operation; inceptive; incomplete; imperfect.

Incorporeal. Existing in contemplation of law and enjoyable as a right, as a right of way, or franchise.

Incumbrance. A burden or charge upon property.

Indemnity. A compensation for a loss sustained.

Indenture. A deed.

Indorse. To write upon the back of any instrument or paper.

Indorsee. One to whom any right is assigned or transferred by indorsement.

Indorser. The person who writes his name upon a negotiable instrument prior to transferring it by delivery.

Indorsement. The act by which a bill or note payable to order is transferred; the transfer of the legal title to any such instrument.

Indorsement in Blank. The form in which the indorser does not name the transferee.

Indorsement in Full. Contains the name of the transferee.

Indorsement Without Recourse. The words used are "without recourse"; without liability in case of non-acceptance or non-payment. They are written after the indorser's signature.

In Esse. In existence. From the Latin word for "being."

Infant. A person under the age of 21 years.

Injunction. A remedial writ, formerly issued almost exclusively by a court of chancery, to restrain the commission of a threatened act, or the continuance of an act.

Insolvency. Laws passed by the individual states for the distribution, among creditors, of the property of persons who are unable to pay their debts in the ordinary course of business.

Insolvent. Not possessing the means with which to pay debts in full.

In Statu Quo. In the same state as before.

Insurable Interest. An interest that may be insured.

Insurance. An agreement by which one party undertakes to indemnify another for certain losses.

- Insurer.** The party who engages to indemnify a party against loss.
- International Law.** The law which regulates by reason and natural justice the conduct and mutual intercourse of independent states with one another.
- Intestate.** Dying without making a valid will.
- Inter Vivos.** Between the living.
- In Transitu.** In transit; e. g., in shipment.
- Invalid.** Having no binding force.
- Joint and Several.** Said of an obligation in which all the obligees are to be held either collectively or as individuals.
- Judgment.** The determination of the law as the result of proceedings instituted in a court of justice.
- Jurat.** From the Latin juratum, sworn; the emphatic word in the Latin form of the certificate to an affidavit or deposition that it was sworn to.
- Jurisdiction.** Governmental authority.
- L. S.** Locus sigilli, place of the seal.
- Landlord.** One of whom land is held subject to the rendering of payment of rent or service.
- Law.** A rule of action prescribed by authority.
- Legacy.** A bequest, or gift, of goods and chattels by testament.
- Lessee.** One to whom a lease is made.
- Letters of Administration.** The instrument by which a person is empowered to take charge of the property of an intestate (generally) to collect the credits and pay the debts of the estate.
- Letters Testamentary.** The instrument under which a person named as executor in a will formally takes charge of the estate, and proceeds to carry out the direction in the will.
- Levy.** Taking possession of chattels by an officer of the law.
- License.** Permission or authority; as, a license to run a hotel.
- Lien.** A tie that binds property to a debt or claim for its satisfaction.
- Liquidated Damages.** Damages which are fixed in amount by the nature or terms of a contract.
- Litigation.** A contest in a court of justice; a judicial proceeding.
- Lunatic.** One who has had understanding, but by disease, grief or other accident has lost the use of his reason, which yet the law presumes that he may recover.
- Maker.** Specifically, one who executes a promissory note. But "law-maker" means a legislator; and "the law-maker," the individual, or body that enacts a law or laws.

Mandate. A charge, command; a judicial command.

Majority. The civil condition of one who is of the full age of twenty-one years.

Maturity. In a will, may import maturity of mind and character, the combined result of age and education; also the date on which notes, drafts, etc., fall due.

Minor. A person not twenty-one years of age; an infant.

Misrepresentation. A statement of fact not true in some particular, and misleading another to his injury.

Mistake. Some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.

Mortgage. A transfer of the title of property as security for a debt.

Municipal Law. The rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong respecting the intercourse of the state with its members and of the members with one another; also, the laws of a locality.

Necessaries. Refers to things essential or proper for the support of a wife, infant, or ward, and to the maintenance of a vessel.

Negligence. Failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done.

Negotiable Paper. An evidence of debt transferable by indorsement or delivery; a commercial, business, or negotiable instrument.

Negotiate. To conduct business; to discuss the terms of a bargain; to endeavor to effect an agreement; to conclude a contract.

Nominal Damages. Those given for violation of a right where no actual loss has been sustained.

Nominal Partner. A person presented to the public as a partner who in reality is not a partner. He is, however, liable as an ordinary partner.

Non Compos Mentis. "Not of whole mind." Not sound in mind, memory, or understanding.

Notary Public. An officer who publicly attests deeds or writings to make them authentic in another country, principally in business relating to merchants.

Oath. Calling God to witness the truth of what is said.

Obligation. A ligament or tie; something which binds one to do or not to do an act.

Ordinance. A rule or regulation adopted by a municipal corporation.

Outlawed. When an obligation by reason of the lapse of time has become barred by the statute of limitations so that no action can be enforced against it, it is said to be outlawed.

Ownership. The right by which a thing belongs to an individual, to the exclusion of all other persons.

Par. The state of the shares of any business or undertaking when they are neither at a discount or at a premium; that is, when they may be bought at the original price, \$100 for a \$100 share.

Paramount Title. The origin and source of another title, as, the title of a landlord in comparison with that of his tenant.

Parol Contract. An agreement entered into by spoken words; also, an obligation not under seal.

Partnership. A "partner" is a member of a partnership, and a "partnership" (often called a "co-partnership") is a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

Payee. One to whom payment has been or is to be made.

Per Se. By itself; in itself considered. As, an act of negligence per se; fraud per se; a nuisance per se.

Plaintiff. Originally, one who makes plaint; one who brings a suit.

Pleading. A plea of any nature.

Pledge. A bailment of personal property as a security for some debt or engagement.

Pledgee: One who receives a pledge; a pawnee.

Pledgor: One who delivers a pledge; a pawnor.

Policy. The settled method by which the government and affairs of a nation are, or may be administered; system of public or official administration, as designed to promote the external or internal prosperity of a state.

Post-Date. To date after the true time.

Possession. The physical control which belongs to an unqualified ownership.

Precedent. A judicial decision which serves as a rule for future determinations in similar cases.

Premium. At a price higher than the nominal value; as, when it is said that a share of stock is at a premium.

Presumption. Next to positive is circumstantial evidence, or the doctrine of presumptions. When a fact cannot itself be demonstrated, that which comes nearest to proof of it is proof of the circumstances necessarily, or usually, attending it; this proof creates a presumption, which is relied upon till the contrary is established.

Principal. A person who, although competent to do an act on his own account, employs another person to do it.

Probate. Formal, official or legal proof; as, the probate of a claim, a will. •

Promise. A declaration, verbal or written, made by one person to another for a good or valuable consideration, by which he binds himself to do or to forbear from doing some act, and gives to the other a legal right to demand and enforce fulfillment.

Promisor. The one who makes a promise.

Principle. A fundamental truth; an elementary proposition; a settled rule of action or procedure.

Proof. "Evidence" and "proof" are often used indifferently, as synonymous; but the latter is applied by the most accurate logicians to the effect of evidence, and not to the medium by which truth is established.

Protest. The formal declaration drawn up and signed by a notary that he presented a bill of exchange for acceptance or payment and that it was refused.

Proxy. A person empowered to act for another; as, to vote a share or shares of the capital stock of a corporation; also the authority itself to represent the constituent.

Pur Autre Vie. For the life of another.

Quantum Meruit. Whatever he deserved.

Quantum Valebat. Whatever it was worth—work, labor, goods, etc.

Quasi. As if; like; corresponding to. Marks resemblance, yet supposes difference, between objects.

Quit-claim. To quit or abandon a claim or title by deed.

Ratification. Acceptance or adoption of an act performed by another as agent or representative; in particular, confirmation of what has been done without original authority.

Real Property. Land, tenements and hereditaments.

Realty. Real estate, real property.

Recession. A yielding up; transfer.

Receiver. One who receives anything belonging to another or others during litigation, or for the protection of a firm's creditors.

Recording Acts. Statutes which regulate the official recording of conveyances, mortgages, bills of sale, hypothecations, assignments for the benefit of creditors, articles of agreement, and other sealed instruments; for the purpose of informing the public, creditors and purchasers, of transactions affecting the ownership of property and the pecuniary responsibility of individual persons.

Recoupment. The act of retaining a part of a sum due by legal right to reduce it because of a counter-claim.

Redemption. Purchasing a thing which the buyer formerly owned; repurchase.

Release. The act of writing by which some claim or interest is surrendered to another person.

Remainder. An estate so created as to take effect and be enjoyed after another estate is determined.

Remedy. A mode prescribed by law to enforce a duty or redress a wrong.

Rent. A compensation or return made periodically for the possession and use of property of any kind.

Residence. The legal definitions of the cognate terms "residence" and "domicile" vary with the circumstances of the case and the mental constitution of judges and authors. While "residence" generally imports

personal presence, one may have a "domicile" in a place from which he is absent most of the time. "Residence" also implies more than a temporary sojourn.

Resident. Literally, one who sits, abides, inhabits, or dwells in a particular place.

Residuary Devisee. A devisee who takes real property not otherwise disposed of by a will.

Residuary Legatee. A legatee who takes personal property not otherwise disposed of by a will.

Revert. To return to the donor or to the former proprietor or his heirs.

Right of Survivorship. The right to succeed to the estate of a joint tenant to the exclusion of his heirs.

Sale. A transmutation of property from one man to another in consideration of some price or recompense in value.

Satisfaction. The settlement or extinguishment of a demand, debt or judgment. Also, the record entry to that effect.

Seal. An instrument for impressing wax made to adhere to a writing, in attestation of the genuineness of the writing or of the deliberation with which it is executed.

Seisin. The possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold.

Set-Off. In law, when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own, to counterbalance that of the plaintiff, either in whole or in part.

Specialty. An instrument under seal.

Specific. Characterizing a species, a particular kind; particular; definite; limited; restricted. Opposed to general.

Status. Standing; state; condition; situation.

Statute. The written will of a legislature, expressed in the form necessary to constitute it part of the law; an act of legislation; an enactment; a written law.

Stock. The animals which are used with, supported by, or reared upon a farm or land; also, share interests in a corporation.

Stockholder. The owner of one or more shares of stock in a corporation; a shareholder. What he "holds" is strictly a certificate of ownership.

Stoppage in Transitu. The right which arises to an unpaid vendor to resume the possession, with which he has parted, of goods sold upon credit, before they come into the possession of a vendee who has become insolvent, bankrupt, or pecuniarily embarrassed.

Sub-Agent. The agent of an agent.

Sub-Contract. A contract under a previous contract.

Subpoena. A writ requiring a person to appear at a certain time and place, or in default, to pay a penalty or undergo punishment.

Subrogation. The substitution of a new for an old creditor; more generally, the act of putting, by transfer, a person in the place of another, or putting one thing in the place of another.

Subscribe. To sign one's own name beneath or at the end of an instrument; also, to write one's name as attesting witness.

Succession. The mode by which a right is transmitted to another person or set of persons.

Summons. A warning to appear in court at the return-day of the original writ.

Supra Protest. Over protest.

Surety. A person who engages to be answerable for the debt, default, or miscarriage of another. The engagement constitutes a contract of suretyship.

Tenant. In its largest sense, anyone who holds lands, whatever the nature or extent of his interest.

Tender. An offer of the exact amount due upon a debt in legal currency; also when either side traverses or denies the facts pleaded by his antagonist he is said to "tender an issue."

Testament. Written or oral instructions, properly "witnessed" and authenticated, according to the pleasure of the deceased, for the disposition of his effects.

Testator. Any person who makes a will; specifically a man, as distinguished from **Testatrix**, a woman, who has made a will.

Title. The means whereby the owner of land has the just possession of his property.

Tort. Improper, unlawful conduct; wrong; injury for which the law gives a remedy.

Trade-Mark. A mark by which one's wares are known in trade.

Transcript. A copy of an original record.

Trespass. In its largest sense, any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property.

Trover. Originally, an action of trespass upon the case for the recovery of damages against such person as had "found" another's goods and refused to deliver them on demand, but "converted" them to his own use.

Trustee. A person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and

for the benefit of another person, who is called the "cestui que" trust.

Ultra Vires. Beyond the power or powers; exceeding authority.

Underwriter. When marine insurance was the only insurance known, a person soliciting a contract exhibited in writing, in a resort for merchants or insurers, the particulars of his application, or sent the application to an insurance-broker. A person who was willing to take the risk wrote underneath the application the sum, his name, residence, etc. Hence "underwrite" came to mean to accept proposed contracts for insurance, to carry on the business of insuring against loss by storm, shipwreck, fire, etc.

Unilateral. When one party makes no express agreement, but his obligation is left to implication of law, as a guaranty.

Usury. Originally, a premium or reward for the use of money, a commodity or other thing; in law, interest in excess of the prescribed legal rate.

Vendor. The party by whom a sale is made.

Venue. The place in which anything is alleged to have happened.

Verdict. The finding of a jury.

Void. As employed in contracts, laws, decisions, and text-books, these words void and voidable are often ambiguous. They have been more or less interchanged in speaking of agreements, assignments, conveyances, sales, leases, orders, judgments, and other acts, transactions and proceedings where incapacity, irregularity, or actual or imputed fraud is present. Void, primarily, means of no legal effect or binding force, while voidable means something that is binding or of no legal effect at the option of the person to be bound.

Voidable. See definition of "void."

Waiver. A voluntary relinquishment of some right.

Warranty. To give assurance of the existence of a fact; as, of the quality of goods sold, the validity of a title, the description and uses of insured property.

Waste. Deterioration; destruction.

Wharfinger. One who keeps a wharf for receiving goods for hire.

Will. An instrument making a disposition of property to take effect after death.

Witness. One who gives evidence in a cause before a court.

Writ. An instrument in writing, under seal, issued by the proper authority, commanding a person to do or not to do a thing.

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